

EXAMINING THE ISSUES SURROUNDING THE NA-
TIONAL LABOR RELATIONS BOARD'S RULE-
MAKING CONCERNING SINGLE LOCATION BAR-
GAINING UNITS IN REPRESENTATION CASES

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HEARING

BEFORE THE

SUBCOMMITTEE ON REGULATION AND PAPERWORK
OF THE

COMMITTEE ON SMALL BUSINESS
HOUSE OF REPRESENTATIVES

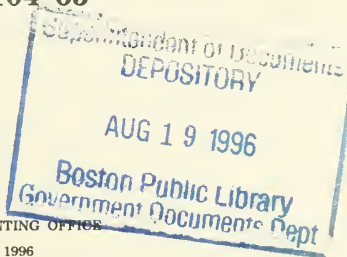
ONE HUNDRED FOURTH CONGRESS

SECOND SESSION

WASHINGTON, DC, MARCH 7, 1996

Printed for the use of the Committee on Small Business

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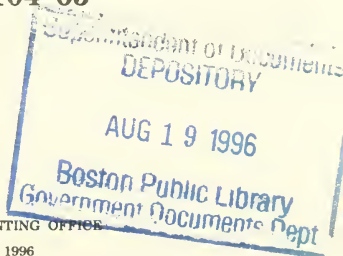
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EXAMINING THE ISSUES SURROUNDING THE NATIONAL LABOR RELATIONS BOARD'S RULEMAKING CONCERNING SINGLE LOCA- TION BARGAINING UNITS IN REPRESENTA- TION CASES

THURSDAY, MARCH 7, 1996

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON REGULATION AND PAPERWORK,
COMMITTEE ON SMALL BUSINESS,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:15 a.m., in room B363, Rayburn House Office Building, Hon. James Talent, (chairman of the Subcommittee) presiding.

Chairman TALENT. This hearing has been called to consider a proposed National Labor Relations Board rule regarding the size of bargaining units. It is a proposed rule with potentially great significance for small businesses and the jobs of their employees.

Under our system of labor laws, when a union seeks to represent a group of employees, the employees have the opportunity in an election to decide whether they wish to be represented by that union. Before the election can be held, it is necessary to determine what the size and shape of the bargaining unit will be, so that we know which employees will be entitled to vote and whom the union will represent if it wins.

Of course, many employers, especially in the retail business, but in other businesses as well, operate more than one facility. Typically, for example, there are a number of department stores or chain restaurants operated by an employer in a metropolitan area.

When a union seeks to represent the employees of such an operation, the board must decide whether to permit a representation election in one facility alone, or to require a unit of more than one facility. The board must decide whether the facilities are autonomous enough to constitute separate bargaining units, or whether the facilities are operated in such a way that as the board put it in 1968, "The day-to-day interests of employees in the particular store have merged with those of employees in other stores," such that the facilities should be thought of as one operation.

This decision requires a balancing. On the one hand, too large a unit may be difficult for a union to organize and represent because it may contain employees with interests that are too dissimilar, employees whom the board would say do not have an adequate community of interest.

On the other hand, too small a unit may balkanize an enterprise in a way that destabilizes collective bargaining and frustrates both employer and employee. If a single employer owns, for example, 10 or 15 restaurants in a metropolitan area and each one were a single facility unit, you could have collective bargaining going on with 10 or 15 different units at different times in the course of a year.

For at least 30 years the board has struck this balance in the following way. The union has the initial advantage. It may seek an election in either a single- or multiunit facility.

If the union asks for an election in a single facility, that choice is respected unless the board finds that a single store unit would be unworkable or what the board calls inappropriate.

In deciding that question, the board considers several factors, among them whether the facilities are functionally integrated, that is, whether they work closely together in producing goods and services and whether labor relations are controlled centrally and apply uniformly to all facilities, as opposed to having personnel decisions made store by store.

Now the board is proposing to change by rulemaking this 30 years of precedent. The board is proposing a new four-factor test to determine whether a single-facility unit is appropriate.

The proposed rule would say that a single-facility unit will be conclusively presumed to be appropriate unless another facility is located within 1 mile, no supervisor is present at the facility, there are fewer than 15 employees at the facility, or 10 percent of employees at the facility have been temporarily transferred 10 percent of the time.

These factors have never been considered determinative by the board under either Democratic or Republican administrations. In fact, in the form in which the board is now considering them, these factors have not even been material.

For example, while the board has considered geographic proximity, there has never been a suggestion that a 1-mile limit is somehow magically or conclusively determinative. In addition, under the new rule the board will no longer consider at least two factors, which in the past it has often held determinative in finding against a single-facility unit the integration of operations among facilities and centralized control of labor relations.

The practical effect of the new rule will be to make a single-facility unit conclusively appropriate in a large number of cases where in the past the board would have required a larger unit.

What is particularly disturbing to me is that the board is proposing this new rule while suggesting that it is not making any substantive change in the law. The board claims that the new rule is designed purely to advance efficiency and convenience for itself and litigants.

But there is no empirical evidence, and in fact the board admits, that it has no empirical evidence, that this has been a particularly inefficient or inconvenient part of its caseload. The NLRB, subject to the statutes passed by Congress, is the primary expositor of the National Labor Relations Act.

The board may change its past precedents, and in fact often has done so, provided that it has a reasonable basis for the new decision. There may be a good reason for changing the law in the area

of single- and multi-facility units. But no one can determine that unless the board admits at least that it is trying to change the law and gives the public and the small business community its reasons for doing so.

I have called this hearing to look into these issues. Chairman Gould of the NLRB is here today to disabuse me and the Subcommittee of the notions I have expressed in this opening statement. We'll call on him first.

Actually, I was going to ask Ms. Velázquez to go first. But since she isn't here, we'll go right to Chairman Gould. I want to say first of all, welcome him here and thank him for working with the Subcommittee. We have had to postpone this on several occasions, in part because of acts of God. The snowstorm at one time made things very difficult to get together. I appreciate him cooperating with us.

Mr. Gould, please go right ahead. This is William Gould, a distinguished former professor of labor law and now the Chairman of the National Labor Relations Board.

Please go right ahead.

TESTIMONY OF WILLIAM B. GOULD, IV, CHAIRMAN OF THE NATIONAL LABOR RELATIONS BOARD

Mr. GOULD. Thank you, Mr. Chairman. I want to thank you for inviting me to appear here today and I have prepared a written statement that I don't intend to go through. I don't know that I can keep to 5 minutes. I thank you for allowing me to go beyond 5 minutes.

I'll try to keep as close as I can to it, and I'd just ask and I imagine that my written statement will be made a part of the record.

Chairman TALENT. We'll be happy to make it part of the record.

Mr. GOULD. Thank you, sir. I am here primarily, although I want to make a few points to—both to respond to your questions and to hear from you. Of course, here as we have been attempting to do through the commentary process from interested parties.

I do want to preliminarily state, Mr. Chairman, that I believe some of the opening—a number of the opening comments that you made are in error.

The factors that we have referred to are in fact in board decisions, approximately 10 or so, not simply as you stated functional integration and centralized control but also common skills functions and working conditions, permanent transfers, bargaining history, as well as temporary employee interchange, geographical separation, local autonomy, minimum unit size.

So there are a wide variety of factors that we have considered. Mr. Chairman, if you look at my written statement, you'll see that the point that I make, and I make here again to you here with all respect, sir, is that contrary to your statement, we are not making new law with this rule.

If you look at the factors that you refer to, functional integration, if you look at the actual cases that we have decided, we do, when we decide cases looking to functional integration, use the very criteria that are involved in this rule, specifically, geographical separation, employee interchange, and local autonomy.

Those are the factors that we look at in connection with functional integration. Centralization. We look at the issue of local autonomy and how much responsibility is possessed at the local level. That is the focus of this rule, because through the requirement in the proposed rule that a statutory supervisor within the meaning of Section 2, Subsection 11 be present for a substantial period of time, we are again looking at the issue of local autonomy.

The one change that we've made in the proposed rule, Mr. Chairman, is that we are being for the first time precise, so that people will be—so that the average person, the lay person as well as the lawyer can know in our system what their rights and obligations are.

The present system, as I'll speak to later, is sadly lacking in this regard. Because what we do is, we refer to many criteria that we have never relied upon in our actual decisions, or rarely relied upon. Then we use some things like functional integration, which gives the appearance of looking to something other than interchanged geographical separation and local autonomy.

In fact, we are looking to those very considerations. So, what we're trying to do here is to be efficient. Now, Mr. Chairman, we have been engaged in this rulemaking process involving this particular matter for a substantial period of time, almost 2 years now, beginning on June 2, 1994, when we promulgated our advance notice of rulemaking.

We have, subsequent to that advance notice of rulemaking, after receiving 41 comments, we issued our proposed rule in the fall of 1995, in September 1995. It has, the period for comment under the proposed rule, been extended three times and that period expires on March 15.

Again, I would as I have in the past, and in my correspondence with you, Mr. Chairman, invite all interested parties to comment. There is still more than a week left. The proposed rule is just that: A proposed rule.

We are seeking to learn from all interested members of the public, including yourself, Mr. Chairman, as to what their views are. I want to emphasize the tentative nature of our conclusions in this proposed rule.

We want to learn more about the practical problems that union and industry and employers and employees face. As you know, Mr. Chairman, we—this is not our first experience with rulemaking. We fashioned a rule relating to units in acute health care which was approved by the U.S. Supreme Court. Our authority to engage in rulemaking was approved by the Court in 1991.

We received, just as we have received this time, many comments. We received in acute health care 1,800 comments and we responded to those comments. We changed—my predecessors changed aspects of the position that they had taken previously in the final rule that was enunciated.

The results of our involvement in acute health care are very encouraging, very encouraging in the sense that we have—we have virtually eliminated litigation about units in acute health care. Most of our units, the overwhelming number, approximately during the past year 62 out of 89, didn't even go to a hearing. They were

resolved because of the clarity of our rule on the basis of an agreement.

I should say, Mr. Chairman, because so much comment has been made about union organizing, that a couple of things about that at the outset. It's interesting to me that, so far as we are aware in acute health care, union organizing, at least in terms of using our processes, has diminished, notwithstanding the more expeditious rule that we fashion.

This rule is not directed to union organizing. There is no empirical evidence whatsoever that stands for the proposition that unions will organize more or use our processes more if this rule goes into effect.

There is no empirical evidence that says unions will be more successful in organizing employees if our rule goes into effect. Our rule is concerned with other matters. I want to address that, because I think that looking at the written comments, that's something you're going to hear about again and again.

Now, let me just say preliminarily, Mr. Chairman, as I have said to you in our private conversations, that I have alluded to in our correspondence, the conversation that we had on December 7 and the exchange of correspondence we had thereafter, that I don't feel entirely comfortable appearing before you today because of the tentative nature of our process and also because we are involved at this point in a deliberative process.

I think one of the points that I made to you when we met on December 7 was that—and I know this seems to astound Members of the legislative branch from time to time—we have absolutely no contact with the executive branch of the U.S. Government in connection with our rulemaking, as well as in connection with our adjudication responsibility.

My view is that that is as it should be, and that is the way we'll always be as long as I am chairman of this Agency. Now let me try to address some of the points that I have referred to in my statement.

First, the point has been made that hearings should be held. Impartial observers who have looked at this issue state that the hearings that were utilized in acute health care were—and also I might say in the Beck rulemaking process were procedural overkill and procedural overkill at a great expense to this Agency, which is operating, as you know, Mr. Chairman, in a period of austerity for all agencies in our U.S. Government.

The second point I'd like to make here is that, as I've said earlier, our approach to this matter is not new. The board has for decades, more than 3 decades, followed the precise approach that we employ here today in our proposed rule.

I don't like to admit this to many members of the staff, but I do, as you can tell, Mr. Chairman, from my gray hair, go back a number of years in this labor law field. One of my first jobs was working for Chairman Frank McCullough, who was President Kennedy's appointee as chairman of the board.

When I served with Chairman McCullough, we handed down some of the first decisions in this area, which established a single-unit presumption. We followed—that single-unit presumption results in a single unit being, so far as we can determine over more

than 3 decades provided in more than 70 percent of the cases established.

The figure is as low as 70 percent, I believe, because in the early 1980's, the mid 1980's, there were many aberrations in the workings of our Agency. One of them was an attempt to, in terms of applying the single presumption rule, to move away from it.

The single presumption rule is appropriate because in a country like ours which is noted for its decentralization, what we did in the early 1960's was to really—and what I hope we will do during my term in office, is to do something that really makes sense, that mirrors the way in which most people operate in American industry.

Our system is a relatively, when one compares it with other countries, decentralized system. This doesn't mean that a single unit should always be provided for under adjudication. As you know, our rule provides a basis for departure from a single unit itself.

Now, let me just address one other issue that is addressed in a number of the comments. It is said particularly by some of the franchise people, the retail people, that whatever Mr. Gould is proposing for—whatever the board is proposing for industry generally, it doesn't make sense for us in our industry.

That's precisely the kind of thing that we want to hear, we want to know why it is that particular industries don't fit within a general pattern. I want to say two things about this.

First, in the rulemaking process in acute health care, we changed our rules so that it didn't cover particular employers that the proposed rule had initially covered. Certain categories of employers were excluded from the rule. Perhaps they should be here because of the idiosyncratic nature of some industry.

That's something we want to know about. The other point that I would like to make to you is that the comments that we received at the advanced notice of rulemaking stage, which began almost 2 years ago, when we focused upon particular industries where we had a great deal of litigation about single versus multiple locations, the comments were, "Don't isolate particular industries."

We tried to isolate retail, trucking and manufacturing. So, what we did was in response to those comments applied a general rule which isolates only—which excludes only at this particular point public utilities, construction and crews on the vessels on the seas.

So, we were responding to that. We were also concerned about litigation, over who fits within one industry as opposed to another. Sometimes we can't resolve the potential for litigation.

We have said in connection with acute health care, and I see that this point is made in one of the comments, that maybe we can't define what is a location in acute health care. The point is made that this will increase the number of units in acute health care by substantial numbers.

If so, we would like to know more about this so that we can devise a more intelligent, well-informed rule than what we have proposed. In any event, the point I want to make is, Mr. Chairman, that regardless of what rule we finally wind up with, there will always be a right to a hearing under our statute.

The board said in the Angelica case in 1985 that there is always a statutory right to a hearing, regardless of whether we engage in

rulemaking or not. So, the employer that maintains that they don't fit within the rule, the employer that maintains that there are extraordinary circumstances which make the rule inapplicable to that party can come forward and say that.

But the final point I would like to conclude on, Mr. Chairman, is this. What we are trying to do in this era of limited resources in the public sector is to do our job more efficiently, to eliminate unnecessary, wasteful litigation, and to speak clearly with a rule that the average person, the lay person as well as the lawyer.

There is no reason for a lawyer to have to get involved in this. I know that many of my colleagues will be concerned about that statement. But before our Agency there is no requirement that a lawyer be involved in the proceeding, Mr. Chairman.

We want to speak clearly in a way which lay people, as well as lawyers, can understand. We're not doing that now because of the vagueness of the criteria that we use, the inherent vagueness of the criteria that we use, doing the same job that we're proposing that we do through the rule.

The fact that, although we allude to many criteria, we don't use most of it. Some of our cases involve as much as 2,000 pages of transcript testimony, hundreds of exhibits. We settled this issue in the early 1960's. I come back after I worked with chairman McCullough in the early 1960's more than 30 years later as Chairman of the board myself, and I see these same number of cases coming back to us.

I might say that the testimony that you have about the number of cases that is coming before us is extremely misleading because it refers to published decisions. Only 9 percent of our decisions in this area are published.

Beyond that, any attempt to indicate that our cases in this area are declining doesn't take into account those cases which we have a right to review from the regional director's decision is not sought. It doesn't take into account the stipulations and agreements that are entered into at the local level. I want to see more of—

Chairman TALENT. Excuse me. If you wouldn't mind me—and I'm interrupting. I'm not at all trying to—Ms. Velázquez was going to be here in a couple minutes.

Mr. GOULD. Yes.

Chairman TALENT. It would be more convenient to go to her when she comes. I'm afraid you're actually going to end a minute or two before she gets here and we can end up balkanizing this hearing.

I'm interested in that point you just made. So, perhaps if you wouldn't mind going on a little longer, elaborate for me and for the Subcommittee what is a process that obviously most people are not aware of. You mentioned unpublished decisions.

Mr. GOULD. Yes, sir.

Chairman TALENT. Would you mind talking a little bit about how these decisions are made at the regional level, when they come to the board, what an unpublished decision is and how much you know about your own unpublished decisions. I mean, would you mind doing that?

I think it would be useful and it would fill in the time here. I would have to go into that anyway.

Mr. GOULD. Surely. The bulk of our cases in this representation area, and this has been the subject of much discussion and some consternation on the part of many people, are not—do not appear in our bound volumes.

I might say that probably in the coming years there will be even a smaller percentage that will appear in our bound volumes because one of the things we look at as board members is cost. It costs us money to print these decisions in bound volumes.

Now, most of our cases, whether they be representation cases or unfair labor practice cases, are dealt with at the local level in the various regions. We have a number of regions, more than 30 regions throughout the United States.

Most of our cases, our representation cases as well as our unfair labor practice cases, are dealt with through agreement or through a regional director decision resolving the issue in dispute.

It's the unusual case in which a right to review is sought and once the right to review is sought and once we take action, it's the unusual case in which we—as I have indicated, more than 90 percent of the cases we don't publish. We don't have data on the number of cases where the single versus multiple location issue arises at the local level.

Staff in the process of getting ready for the advanced notice in 1994, in June 1994, looked at 26 cases which came to our attention in fiscal year 1994. We took from those cases some of the data that I have referred to, both in my written statement and here today.

Chairman TALENT. So, summarizing just really for the Subcommittee, if there is a question raised by one of the parties below, they can ask for a hearing. The regional director will have a board agent hold a hearing.

Mr. GOULD. Yes, a hearing officer.

Chairman TALENT. The regional director will make a—the hearing officer. The regional director will make a decision and then either party can appeal that or seek review at the board level.

Mr. GOULD. That's correct.

Chairman TALENT. Of course in most cases, like in any other case, they don't.

Mr. GOULD. That's right.

Chairman TALENT. So, in most cases, even when there is a decision, they don't seek appeal. In cases where they do, the board will often make its decision in an unpublished order. That's right?

Mr. GOULD. That's correct, in the overwhelming number of instances, Mr. Chairman.

Chairman TALENT. A couple of questions, and then I want Ms. Velázquez to have time to get settled here. I'm interested in this also. What percentage—how many published opinions does the board have on any subject in the course of a year, approximately? I mean, how many hundreds of them would you have?

Mr. GOULD. You know, here—

Chairman TALENT. Any idea? Any of your staff know?

Mr. GOULD. Here I'm going to see if I can turn to—

Chairman TALENT. Sure. Feel free.

Mr. GOULD [continuing]. my staff here. I told them that I wouldn't try to do this and put them on the spot rather than me, but I don't really know the precise figure.

Chairman TALENT. Well, that's—

Mr. GOULD. The executive secretary advises me about 900 decisions.

Chairman TALENT. About 900?

Mr. GOULD. Yes.

Chairman TALENT. It does surprise me that the board would not internally have some way of determining, not—the regional director level, I can understand the difficulty of that, but of how many of its own unpublished decisions, which after all have gotten to your level.

So even if you're not publishing them for the public and the Labor Law Bar to see, I am surprised that you cannot internally say, OK, X percent of these decisions related to unit question or single-unit types of questions. Is that—I mean, why is that so difficult for the board to do? I mean, again, you can—I understand this.

Mr. GOULD. Well, yeah. They often involve a large number of issues. They may come to us on location, on issues, on supervisory issues we simply don't have at present.

I mean, the very first question I asked when we began this process was, I wanted to go back really since the time of Chairman McCullough or beyond, and find out what the percentage of cases was that came to us in Washington that involved this issue. We simply, by virtue of the wide variety of issues involved, don't have a retrieval system which permits us at this juncture to do that.

Chairman TALENT. OK.

Mr. GOULD. I hope in the future we do.

Chairman TALENT. I've been filling in a subject I was going to ask about anyway, pending the arrival of our distinguished ranking member of this Subcommittee, Ms. Velázquez, who I will now recognize for an opening statement.

Why don't you, in view of the fact that I have started questioning, why don't you just go ahead after that and ask any questions that you feel appropriate.

[Mr. Gould's statement may be found in the appendix.]

Ms. VELÁZQUEZ. Thank you, Mr. Chairman. I just want to really thank you for your tolerance and understanding. I was on the Senate side testifying before a Committee.

Mr. Chairman, I want to thank you for calling this hearing on the NLRB single location bargaining unit rulemaking process. I will ask for unanimous consent to include my remarks in the record.

Chairman TALENT. Without objection.

Ms. VELÁZQUEZ. Thank you. The issue of the NLRB's proposed rule is of great importance to workers across this country. The mission that the NLRB is charged with, after all, ensuring the fair treatment of workers, as Members of Congress, we must ensure that any new measures adopted by the board are true to that mission.

I do, however, believe that if what we are trying to do is provide a full examination of this issue for both the Members and the public, we would have been better served to wait until the coming period had closed.

This would have allowed us to fit all the pieces in place before addressing this important matter. This rule comes on the heels of the lessons that the NLRB has learned during its reexamination of how employees in the health care industry will be allowed to organize.

Building on these lessons, Mr. Gould and the NLRB have crafted a balanced rule that allows workers the ability to organize without severely hampering businesses. This proposed rule goes a long way in clearly defining what is an acceptable bargaining unit.

It saves money and time for small business owners and employees and allows both to focus on the important task of creating a successful business. This measure comes at a critical point.

As the administration grapples with the changing budget environment and the NLRB deals with a proposed 30-percent cut, Mr. Gould and his staff have used the rulemaking process to reduce costs, streamline Government and show that smaller Government can be more efficient.

I am sure that today many of our witnesses will question why we need this rule. I will tell you that if you want smaller, more efficient Government, then we must take steps to avoid costly, drawn-out litigation.

At a time when this Congress is calling on various agencies to do more with less resources, it is gratifying to see the board rise to the challenge without sacrificing its commitment to its mission.

The NLRB is to be congratulated for its work on this rule and for its efforts to comply both with its duties as outlined in the National Labor Relations Act and with the fiscal impositions of this Congress.

I look forward to the insights of all the witnesses, and I'm sure it will be a lesson to us all on how our votes on the budget and the streamlining of Government shape the policies in our local communities. I would like to ask some questions to Mr. Gould.

Chairman TALENT. The gentle lady is recognized for questions.

Ms. VELÁZQUEZ. Mr. Gould, under existing NLRB case law, can unions organize single locations of employers?

Mr. GOULD. Yes, Congresswoman Velázquez, they can do so. Indeed, as I indicated to the Chairman earlier, our rules—and I use this term loosely through the adjudication process—usually allow them to do so because there is a presumption in favor of a single unit.

Ms. VELÁZQUEZ. So, in fact, what these proposed rule does is just codify existing law on single location units, correct?

Mr. GOULD. It does, Congresswoman.

Ms. VELÁZQUEZ. Is this rule in any way a significant departure from current case law?

Mr. GOULD. It is not a departure from case law, as I have indicated to the chairman.

Ms. VELÁZQUEZ. Well, do you foresee that it will have a significant effect on the actual outcome of cases?

Mr. GOULD. I do not. I think that in the very substantial number of cases today, as I estimated to the Congressman Talent, 70 percent of the cases we find a single unit and that statistic is somewhat skewed by a number of cases in the 1980's, where we began to move away from that.

My estimate is that we would find a single unit in roughly speaking the same number of cases that we find a single unit today through the adjudication process. The one thing that has changed is that we can do it more efficiently and quickly and speak in terms which is understandable, which are understandable to the average person.

Ms. VELÁZQUEZ. Other than budget constraints, is it not the case that the NLRB decided to draft this rule in response to what could be described as a pattern on the part of businesses to file claims with the board as a stalling tactic in labor negotiations?

Mr. GOULD. Well, Congresswoman Velázquez, this does not usually arise out of labor negotiations as such. Our concern here was that there—as there seems to be in so much—so many areas of our life and in labor law, there is too much litigation, too much reliance upon lawyers, when we can do the same job more efficiently—and dare I say it with all the lawyers here present?—without lawyers.

Ms. VELÁZQUEZ. Mr. Gould, in our next panel of witnesses, we will be joined by a representative from the National Council of Chain Restaurants. In your remarks you make reference to the decision on the Red Lobster chain.

Could you tell us how often such units are found appropriate in this industry?

Mr. GOULD. Well, we know that in a very substantial number of those cases, the single units are found to be appropriate in restaurant.

For instance, in a very recent decision which was signed by my predecessor, Chairman Stevens, and by member Rodabout, two of President Bush's appointees, a single unit was awarded in the Jolly Roger Hawaii case where the employer—I think that more than 20 restaurants were in the area and one unit was fashioned, even though I think other restaurants were less than a mile away from the first restaurant where representation was sought.

There are a number of cases that come before us and most of them—many of them, if not most of them, seem to result in a single unit finding. Again, there would be no difference in the approach that we are taking.

Actually, in 70 percent, I am advised here by staff, 70 percent of the restaurant cases a single unit is found. Again, that figure I think goes back to 30 years. Again, that takes into account in 1980's where the board was moving away from, for a variety of reasons, single units.

Ms. VELÁZQUEZ. So, Mr. Gould, would you say then that the number of cases in this area amount to more than just a handful?

Mr. GOULD. Indeed.

Ms. VELÁZQUEZ. How long have you been engaged in this rule-making?

Mr. GOULD. Well, we have been engaged in a formal way in almost 2 years, Congresswoman. Really, we have been at work at this ever since I came to office 2 years ago today. We have been—we published our advanced notice of rulemaking on June 2, 1994.

Ms. VELÁZQUEZ. Mr. Gould, the proposed rule states that businesses can still file a case with the NLRB under extraordinary circumstances. Could you elaborate on this?

Mr. GOULD. Yes, I can. There is always a right to a hearing. The employer is entitled to a hearing on two issues: Whether the rule applies to that particular employer in the first instance, and second, whether there are extraordinary circumstances which justify not making the rule applicable to that employer.

We assume, just as we assume today, with adjudication that most of the cases will result in a single unit. There is no change in that regard. But there is an opportunity for the employer to show that there is something idiosyncratic about its enterprise, which would make it unworkable or undesirable for the rule to apply.

Ms. VELÁZQUEZ. Mr. Gould, in yesterday's *Washington Post* there was an article on this hearing regarding this, and some business groups claim that there still will be quite a bit of litigation as a result of this clause. In fact, that very argument is made in this article. Could you please comment on this?

Mr. GOULD. Well, I would imagine that, just as was the case in acute health care, that some employers will challenge the validity of this rule. I have very little doubt about our ability to prevail.

I think that we will succeed, just as the board succeeded in acute health care. So, in that sense, there may be some litigation. But once the rule is in place and once the courts have affirmed it, as they will, I have no doubt that it will cut out litigation just as we have cut out unnecessary litigation and reliance upon lawyers in acute health care.

Ms. VELÁZQUEZ. Thank you.

Thank you, Mr. Chairman.

Chairman TALENT. I thank the lady. Let me just follow up on one thing Ms. Velázquez asked. You began this rulemaking 2 years ago, approximately. Isn't that right?

Mr. GOULD. Well, I—yes, sir. I began—

Chairman TALENT. The board.

Mr. GOULD [continuing]. working on it in Washington here 2 years ago and we published our advanced notice of rulemaking on June 2, 1995, almost 2 years ago now.

Chairman TALENT. That's of course before the major restrictions on the board's budget that Congress passed this year.

Mr. GOULD. That's correct, sir.

Chairman TALENT. I understand the fiscal climate has been tight for a number of years.

Mr. GOULD. I might say, if I could, Mr. Chairman, that my answer to one of your earlier questions is a little incomplete. When you asked me about our ability to identify cases that involve single and multiple locations, we, at my urging, we established a Committee that would allow us to be more effective in identifying cases even where a number of issues are involved through the new technology that is becoming available to private industry.

It's a so-called Cats project. But the budget restrictions that have been imposed upon us have made it impossible for us to continue with the Cats project. I'm advised that in the current budgetary environment it's unlikely that we will be able to, notwithstanding my interest in doing so, identify cases more effectively than we are doing at present.

Chairman TALENT. Well, it might be worthwhile following upon that to make sure that you have enough funds for that project as this rulemaking goes on. So, we certainly would take that under advisement.

Mr. GOULD. We are urging the Congress always to listen to our requests about budget and your support and influence in this regard, Mr. Chairman, would be appreciated.

Chairman TALENT. Mr. Chairman, I would not think very much of the head of an Agency who didn't believe that his Agency was entitled to more money from the Congress. It would just simply indicate that you didn't think your job was important.

We are going to follow, as we always do here, the rule of recognizing people as they come. I'm going to do that, notwithstanding the fact that my very distinguished friend and colleague from Missouri has come by the hearing.

Every personal inclination tempts me to recognize him first. But out of deference to the established rule, I am going to go ahead and recognize my good friend, Mr. Longley, for 5 minutes of questions.

Mr. LONGLEY. I would certainly concur with your respect, concur to your respect for the Representative from Missouri.

Mr. Gould, I want to begin with a couple comments. First, I am going to have to leave this hearing because I've got two other hearings being conducted simultaneously. But I will have a member of my staff here.

I want to begin by accepting your characterization that this is a tentative rule and there is a rulemaking process under way, and comments, et cetera.

But to be very, very blunt, I want to pick up on your comments in your testimony, particularly your reference to your response to the letter to Chairman Talent, wherein you indicated, referring to Mr. Talent's letter, that Mr. Talent had stated that the vast majority of business owners are not regular readers of the Federal Register.

You then went on to say, I would be grateful if Mr. Talent could supply you with the names of such employers, and that you would personally undertake to send copies of your notice to them so that they are able to participate in your proceeding.

With all due respect, I think you totally missed the point that he was making. That is, the underlying question is whether or not these businesses should even be worried about these proceedings, or whether the statute was written in a manner to encompass them.

I have to suggest that, very candidly—and I'm speaking with respect to the small businesses in my own district—very few of them can afford the luxury of first, receiving a notice, second, they won't understand it, third, they can't afford to hire a lawyer to deal with it for them, and fourth, even with the right to a hearing, they are being drawn into a process which I'm not sure you really intended to bring—to involve them in.

I want to just pick up on the *Washington Post* article. There was something in it that got my attention. We're talking particularly as it relates to fast food restaurants.

I have some experience working in a fast food restaurant. When I was a teenager, I worked in one. I went through the training, and

like most teenagers I came and spent a couple weeks, couple months, and then I was gone.

Most of the fast food restaurants in my district have an extremely high turnover rate. What you are in effect suggesting or what the press accounts would appear to suggest about the rule that's being considered is that some of these restaurants could be consciously or even inadvertently drawn into a legal quagmire, regulatory quagmire, that they have no interest and very frankly the statute had no intention to involve them in.

Again, with respect to the fact that—and I have to respect the fact that you are attempting to appropriately fashion rules to deal with the intentions of the statute, I've just got to question to what extent, going back to your comments, that we are or you are proposing to involve scores of businesses that frankly may have little or no—there may have been little or no intention on the part of the Congress to draw into this scheme.

Do you understand what I'm questioning?

Mr. GOULD. I do, sir, and I appreciate your comments, Congressman Longley. I want to tell you, if I haven't made myself sufficiently clear in this regard, that this rule is designed to assist small business. This rule will make the life of small business much more to—than large companies which can afford counsel, more—will improve the position of small business.

Because small business, by virtue of its economic situation, are the last people who can afford counsel. Under the existing system you have to have counsel. It's because it's a crap-shoot.

There are so many different criteria that the board is looking to. The criteria—and this is the important point, Congressman—are in their application inherently vague. The board never tells people where they are, how they stand.

What we have done through this rule for the first time is to say, "Mr. Small Businessman, you don't have the resources to employ high-priced counsel. You can sit down and see and read this thing for yourself. You don't need to employ, as you do under the present system, high-priced counsel to deal with this problem."

Now, the statute, Congress has spoken—

Mr. LONGLEY. Mr. Gould, could I just—

Mr. GOULD. Well, I just want to say, Congressman, that this Congress, that the Congress has spoken and made this law applicable to restaurants and fast food franchises, and the rest.

That's not my decision. The other point is that if this rule should not be applicable to particular industries, as I said to Mr. Chairman, the Chairman, that then that is something we want to know about.

If there are idiosyncratic features of this industry which make it so different from other industries that the rule ought not to be made applicable or the rule ought to be fashioned in a different way, well, that's something that I want to know about and I think the other board members want to know about in coming to this conclusion.

Mr. LONGLEY. Mr. Gould, if I could just interject. I respect what you are trying to tell me. But I still don't think that you get the point. I will give you a specific example.

I won't mention the business, but it's a small business in my State. It employs 150 people. The owner of that business gave me a list of the 54 local, State and Federal agencies that he reports to.

I have got to tell you that, yes, you may be a nice guy, and I take it for granted that you are. But you are now proposing that you be perhaps number 55 that he reports to.

Mr. GOULD. No one is—

Mr. LONGLEY. I've got to tell you something else. I understand the procedures. But what is in effect the issue from my standpoint is the question of whether or not it is appropriate for an Agency of the Federal Government to be expanding its authority or expanding its jurisdiction in manners that add to the burden.

Because I've got to tell you, this one business made it abundantly clear to me that if he has any more Federal or State or local agencies to report to, that it's going to pay a price in jobs. Because he has to sit down and take responsibility for the legal jurisdiction that is being asserted over him by a Federal Government that is bending over backwards trying to involve itself in his affairs.

Frankly, he's got a choice. Does he spend his time and his resources complying with the neat little procedures and systems that are being set up in Washington, or does he create jobs?

Mr. GOULD. Congressman—

Mr. LONGLEY. In many cases jobs aren't being created. I'm convinced that we are losing thousands, if not hundreds of thousands or millions of jobs based on ill-considered regulatory actions by Federal, State, and local government that don't respect the fact that many people in business are scratching to hang on, to survive.

They do not have the time to go through all these other notices. Again, with respect to what you are saying, fine. Maybe he can spend 10 minutes, 20 minutes, 30 minutes, looking at your rules, your notices. But what about the 54 other local, State and Federal agencies that take exactly the same attitude?

No two of those agencies, either on a local, State or Federal basis, spend any amount of time talking to any of the other 53 about how they can consolidate what they are doing and take that paper and regulatory burden off of the business. That is costing us jobs.

I didn't mean to get into this kind of a repartee, but I want to convey the depth of my feeling on this issue and the seriousness with which many of us are trying to look at these issues, because it is killing the economy, it is killing job growth and jobs in this country.

If I've got a choice between a small business in my district getting involved with your Agency or a small business in my district actually hiring some people and creating jobs and creating opportunities for people, I will go with the opportunities.

Mr. GOULD. Congressman, I hope that you would tell the small businesses in your district that this rule will help them. This will lessen the burden that is being imposed upon them. There is no requirement to file any kind of report. There is no requirement to report to us.

The reason that I asked the Chairman, that I told him that I wanted to spread the message about this proposed rule to people

was that they—so that they would know that they don't have to, as they have to under the existing system, employ high-priced counsel, that they don't have to go through red tape and vague criteria—

Mr. LONGLEY. Mr. Chairman—

Mr. GOULD [continuing]. as they do under the existing system.

I would hope, Congressman, that you would make that known to the businesses in your district so that they can know that there is somebody in Washington who is concerned about lessening the burden on small business. That is what this rule is about, Mr. Congressman.

Mr. LONGLEY. If I could just add without taking any more time.

Chairman TALENT. Briefly, if you wouldn't mind, because we have other people waiting.

Mr. LONGLEY. As you know, we all have an obligation to follow the law. I respect the fact that you are attempting to advise people of what their role is under the law.

But from my standpoint, if you are doing that, asserting that process with respect to businesses that have or shouldn't have any—over which you should have little or no jurisdiction, that it would be far better if you define clearly who is covered and who isn't so that they don't even have to worry about whether they understand it or not and you don't have to worry about the cost and the expense of trying to find them.

So thank you, Mr. Chairman. I appreciate your candor.

Mr. GOULD. Thank you, Congressman.

Chairman TALENT. I thank the gentleman for his questions, and we are going to now—Mr. Luther informs me that he does not mind if Mr. Skelton goes ahead of him. It certainly won't come out of Mr. Luther's time. So, I will recognize the gentleman from Missouri for questions. I'm waiting to ask my questions until the other Members are finished.

Mr. SKELTON. Mr. Chairman, I will be brief and I might mention probably that I am in the middle of another hearing as ranking member on another subject, I mean. So, I appreciate your indulgence.

Chairman TALENT. I know exactly what that hearing is and I hope I can get there myself.

Mr. SKELTON. Mr. Gould, it's interesting to note your comments about lawyers.

Mr. GOULD. I'm a lawyer myself, Congressman, and some of my best friends are lawyers.

Mr. SKELTON. Let this small-town country lawyer ask you a question. I suppose, boiled down to its bottom line, the question would probably be, "So what?"

It appears that some are saying that this proposed rule would make it easier for unions to sign up new members. The Nation is low-wage service industries. Your testimony says it merely codifies existing law and there is no change. At least that's—I assume that's your testimony.

Mr. GOULD. It is my testimony.

Mr. SKELTON. My bottom-line question is: What difference does this proposed rule make in the whole scheme of things?

Mr. GOULD. The difference it makes is this, Congressman, that under the existing system the board, through adjudication, doesn't tell you, first of all, what these criteria that it's using in resolving this issue really mean.

In one case, the second facility may be less than a mile away. In another case, it may be 20 miles away. In the case where it's less than a mile away and you would think that there would be a community of interest of employees, the board may find just one unit.

In the case where it's more than 20 miles away, the board may come to the opposite conclusion. There is no clear, understandable, definable rule that exists so that people know what their rights and obligations are.

So as the result of that, one must retain counsel because it's kind of a crap-shoot, because counsel comes to the small businessman and says, "Look, if you want a unit consisting of five different facilities, maybe I can get it for you. Because no one really knows what the board will do."

So the premium is placed upon wasteful litigation because we are not speaking clearly in an understandable fashion to the average person, let alone the member of the Labor Bar.

As I have said to the Chairman in my response to his questions, some of the criteria that we refer to in these decisions we don't in fact even use in resolving these cases. The Court of Appeals for the Seventh Circuit has recently lamented that single location decisions seem to be impossible to reconcile. That's the Court of Appeals for the Seventh Circuit speaking.

They are impossible to reconcile. They are impossible for lawyers, let alone average people who are not lawyers, to understand. It seems to me that if we are going to do our job here in Washington, we must speak in a clear and understandable manner so that people don't have to resort to unnecessary litigation, so that people don't have to go through hearings which involve thousands of pages and hundreds of exhibits, so that the little guy, the employer, the small employer and the average employee, doesn't have to have imposed upon him or her this burden and so that the taxpayers, Congressman, don't have to pay for this as well.

I think that this rule will prove to be a very substantial improvement once it's in place and once it's accepted, once we arrive at a final rule, upon our current way of doing business, which is to rely upon adjudication.

I am a lawyer and you are a lawyer and lawyers can do very many valuable—perform many valuable services. The role that lawyers play in this situation is not one that serves the public good, the public interest.

Mr. SKELTON. Mr. Chairman, I thank you and I also thank Mr. Luther and I will yield back.

Mr. GOULD. Thank you, Congressman.

Chairman TALENT. I thank the gentlemen. Mr. Luther, if he returns, I'll certainly give him the opportunity to ask questions. No questions from the gentlemen?

I have some questions then I want to get into. Mr. Gould, again I appreciate your being here. Let me say as a preliminary matter that I understand that this rule is tentative and I certainly will say

that in everything I have read from the board and in every personal statement you have made, you have emphasized that fact.

So this is a rule in the process of being developed. So, it's not final. The process, the reason for this process, is so that the board can consider input from various parties. I know that you are actively doing that and appreciate that.

Mr. GOULD. That was the purpose of my response to your correspondence, Congressman, that I wanted to—I want to get the most input that I can from all parties, as I said, including yourself and all the other Congressmen and Congresswomen who are here today.

Chairman TALENT. To follow up with something Mr. Longley said—and I thought the two of you were a little bit talking past each other—the point he was making is that the average business person, and especially this average small business person, is subject to so many different schemes of regulation that the idea that they are aware of this process going on and have the opportunity to comment is simply not the reality in most cases.

Now, I understand there is really nothing you can do about that. I mean, you can't stop doing your job because not everybody in the country is aware of it. But that was the point that he was making, that it is just not feasible to expect the average small business person to be aware of it.

Let me also say that in response to a statement, just like a sentence that you said that I have never suggested that you or anybody on the board was making a decision here based on political considerations. That is not something that has come from this side of this exchange.

I know that you are an independent Agency and you are making the decisions based on what you think is best for the law. Now, let me just say with regard to the appropriateness of this hearing and at this time, this is the Subcommittee of the Small Business Committee on Regulations and Paperwork.

When I see a rule or regulation, whether it's in development or has been promulgated, which I think has the potential to hurt or disrupt small businesses or their employees, it is really the job of this Subcommittee to investigate, just as it is your job to try and refine labor law in the proper direction.

I would rather do that. You and I had a little difference of opinion about this, which we kept as—I think we've kept this whole matter on a very cordial level. I would rather do that while the rule is being developed, rather than try and do it afterwards.

We had a hearing on a rule that OSHA had promulgated regarding false standards. As I think due in no small part to that hearing, they ended up reconsidering the rule and engaging in negotiated rulemaking and coming up with, I think, a better result.

I just thought it would be better to do this while the rule was in process, rather than necessarily doing it afterwards. That's the reason why we're having this hearing now.

Let me get into the areas of my concerns. Now, I want to establish something up front. The proposed rule would not permit consideration as such of centralization of labor relations or functional integration of the various facilities.

Now, I know your view that it would de facto allow that in the consideration of other kinds of things, in fact as proxies. But as such, evidence of those things, centralization of labor relations or functional integration, would not be admissible if the rule as proposed were promulgated. I mean, isn't that correct?

Mr. GOULD. No, Congressman. As I have indicated to you previously, it is not correct. On the issue of centralization, we have specifically addressed that by addressing the issue of local autonomy.

We have done that through requiring that a supervisor be present, a supervisor within the meaning of Section 2, Subsection 11. Now, let me say that maybe that is not the way for us to go. Maybe there's another way to go.

One of the things that concern me personally was that there might be, and I think somebody in one of the statements has alluded to this, a lot of litigation about what's a supervisor within the meaning of the act. So, maybe this is not the way to go.

But we have not done a good job defining with precision what degree of authority must be in the hands of local people through our adjudicated decision.

Chairman TALENT. Let me just—

Mr. GOULD. So, we are trying to address and do address this issue of centralization. As I have said to you before on the issue of functional integration, if you look at the board cases as they are decided, I think what you've got to do and what we have to do in life often is look past the rubric and look at the real decision. Look at what it is that we are in fact doing.

I want to eliminate misleading rubrics. I think that we are doing that through this rule. We are—

Chairman TALENT. Well, let me get into it just a second though, because—

Mr. GOULD. Sure.

Chairman TALENT [continuing]. in a real-life situation, I mean, if I was at a hearing on unit appropriateness and I made a offer of proof, as I say, I stipulated that there was a supervisor, as I would have to if there was a statutory supervisor present in the facility, I stipulated that.

But then want to go offer evidence that as regards wages, fringe benefits, determination about holidays—a whole host of things regarding labor relations—that those were decided centrally and were not within the control of the supervisor present at the facility, under the rule that offer of proof would be rejected, wouldn't it, because it is not relevant to the consideration of the rule, wouldn't it?

Mr. GOULD. I don't—

Chairman TALENT. I mean, if it wouldn't be rejected then you are not saving any transcript time. If you're going to say all this evidence is going to come in anyway under a different—under the question of supervisor autonomy—then you are not saving any time or transcript pages. I mean, the hearing officer would have to reject the offer of proof, wouldn't he?

Mr. GOULD. Well, I would assume that any fact or evidence about any non-material fact in the rule would be rejected. On the other

hand, I can't sit here today and conceive in advance of every twist and turn——

Chairman TALENT. I understand.

Mr. GOULD [continuing]. that evidence would take and what would constitute extraordinary circumstances.

But I would assume on the face of it that evidence about nonmaterial factors would be rejected.

Chairman TALENT. Sure. I understand that smart lawyers like you and me in this field would instantly try and get around the rule if they thought that their clients were advantaged.

But I think we made the point that, as such, in considerations going to centralization of labor relations or functional integration that are not relevant to the factors cited in the rule, like, for example, supervisory status, would be immaterial under the rule and would not be admissible.

That's why you expect the hearings would be shorter and you would save—you would save time. Now——

Mr. GOULD. Yes, sir. I must say in connection with your most recent comment that of course the board and the courts have frequently pointed to the fact that if you use centralization in some other way that many people can react and say, "All right, if this is a way of getting the kind of unit that I want, I don't want a single facility. I'll change everything. I'll centralize wages, hours, fringe benefits." So it's the potential for manipulation.

Chairman TALENT. I'm going to the question of whether the rule will have the effect of changing board law in the past. I have warned some of the people in the audience that, although I know you're trying and I'm trying to avoid this becoming like an exchange between two old labor lawyers, it may become that.

So if everybody can try and hang on by their fingernails and follow, we'll do the best we can. I was reading the testimony of this for this case, and some of the comments that have been submitted.

Without doing a lot of independent research, the chain restaurants comments suggested that there were some 60-odd published cases relating to this. I presume that they got on Lexus or did the—in the last 15 years, of which something like 32 or 33 of them had decided that a single facility unit was inappropriate, was in the layman's term, unworkable for those concepts.

Without trying to read all 33, I had 8 or 9 of them pulled out and I read them. This is one of the things that concerns me, Mr. Chairman, because I don't see how you can engage in a fair reading of those cases without saying that the questions of centralization of labor relations and functional integration of the enterprise were very important to the board's decisions in those cases.

Now, not that they didn't consider other things, but were very important. Frankly, I think it's accusing those board members of a disingenuousness that they did not have to suggest that this was just a rubric or, as you said, a misleading rubric. Now, let me——

Mr. GOULD. Well, I want to say, if I could, Mr. Chairman, on that particular point, that as I have said in my earlier remarks regarding the restaurant industry and this single facility issue generally, a number of the decisions that you get in between about 1982, 1986, and 1987 are going to constitute and aberration.

Because we did have a very peculiar period in history. There are a couple of other decisions, prominent decisions involving fast food restaurants in the early 1970's that Chairman Miller, who was appointed by President Nixon, had a very different view of this issue as it relates to some industry.

So I do want to qualify my remarks and to say to you that some of our decisions in the mid 1980's and the very early 1970's are an exception to the general proposition that I have asserted.

Chairman TALENT. Well, let me—and again, without—I'm not going to go through all of these. I'll just say that in every one that I read, from all different parts of the—or times, dealt very significantly with those two issues. I'm going to read for the record some statements by the board.

Again, I'm not saying that the board didn't consider it. Let me do this, and then you can comment, if you would, Mr. Chairman.

Mr. GOULD. Surely.

Chairman TALENT. The board did not consider other things, although there were some of these cases where basically it just went off on these issues and not other ones. But let me read them to you.

One of them is from 1968, Star Market Company, which is a grocery store, not a chain restaurant, in which the board said: In our recent decision in Hague Drug Company, Incorporated—this is 1968—we restated our general approach to the questions of units in retail chain operations and emphasize that we will adhere to our policy of finding a single store to be a presumptively appropriate unit, but that such presumption might be overcome as where it was shown that the day-to-day interests of employees in the particular store had merged with those of employees of other stores.

Thus, factors of significance in this connection were pointed out as being whether or not the employees performed their day-to-day work under the immediate supervision of a local store manager who was involved in rating employee performance or in performing a significant portion of the hiring and firing of the employees and is personally involved with the daily matters which make up for their grievances and routine problems.

For as we indicated there, it is in this framework that the community of interest of the employees in a single store takes on significance. From 1973, in a unanimous decision with Chairman Miller, members Fanning and Jenkins, this is not a chain restaurant decision either.

The board said: In so concluding, concluding that a single unit would be inappropriate, we rely specially on the fact that both plants are highly integrated and engage in manufacture, assembly and distribution of various disposable filter media, and that, notwithstanding an 18-mile geographic separation, both plants have the same plant manager and personnel manager who divide their time between the plants and administer a common operational and labor relations policy.

From 1984, which would be in the era that you mention: We disagree with the regional director and find that the involvement and control demonstrated by Eastman restricts the authority of these store managers considerably more than the regional director's decision would indicate.

As the board noted in Petrie Stores Corp., the lack of the individual store manager autonomy may compel a finding that the single store unit sought by the petitioner is inappropriate, particularly where there is a high degree of centralization of administration and control.

Moreover, if the interests of the employees of a single store may be shown to have been effectively merged into a more comprehensive unit so that the store has lost its individual identity, the presumptive appropriateness of a single store unit is rebutted.

Finally, Stern's Department Store, a panel—as far as I can tell, a two-member panel—evidently you were short on the board at the time, but consisting of you, Mr. Chairman, and Mr. Devaney, said as a statement of the board law: There is a well-established presumption in favor of a single location unit, which the parties seeking to overcome may rebut by a showing of functional integration so substantial as to negate the separate identity of the single facility unit.

Now, I'm going to presume that you were not engaging in a—and you said this, I didn't—a misleading rubric when you stated the board's law was that a party seeking to overcome the presumption may rebut it by a showing of functional integration so substantial as to negate the separate identity of the single facility unit.

I'm not going to read, but I will have entered into the record the comments of former chairman, member Stevens. When this—and I'm almost done—who said at the time that the proposed notice of proposed rulemaking was issued, that in his opinion there was a substantial line of board cases and doctrine going off on the issue of centralization of labor relations and that the proposed rule was not simply a minor administrative change but was an overruling sub silentio of whole line of doctrine.

Well, let me make one other point to you that of course a supervisor may—a person may be a statutory supervisor, which you said in your statement before was a proxy. Whether a supervisor was present was a proxy for determining whether there was centralization control of labor relations.

But as you know, a manager can be a statutory supervisor while actually having relatively little control over the labor policies of the enterprise. So, we're going to have to vote in a minute, but I want to give you a chance to comment before. Then you can add your comments when we come back.

Go right ahead.

Mr. GOULD. Thank you, Mr. Chairman. I think that the point I would like to make about some of the cases you refer to is that the board has never precluded a single location unit solely because there exists some centralized control of labor relations.

The board long ago noted the significance of local autonomy in single location cases and has historically relied on the retention of local control, not the degree of centralized authority. This was set forth in the decision that one of the cases you referred to referred to.

That is the Hague Drug Control decision. That is 169 NLRB 877. That's the approach that the board has followed through adjudication in the main and that's the test supported with 50 years of board precedent.

Now, I realize that there have been flip-flops and that some of the cases that you refer to show those flip-flops. That's what we want to get away from, Mr. Chairman. We want to get away from one board coming along appointed by one President, and they say, "Oh, these criteria mean this."

Another group comes in and they say, "Oh, no, it means this." Nobody is served by that. I think that the point has been made that we must have stability. Indeed, we must have stability.

This rule is designed to promote stability that will not depend upon varying applications of the same criteria, depending upon who is chairman of the board or a member of the board today and who is the chairman of the board or member of the board tomorrow.

Chairman TALENT. I think that—excuse me.

Mr. GOULD. Surely.

Chairman TALENT. Mr. Chairman, if I can just—see, I think that makes my point. Because what you're saying is that there have been flip-flops in the past. In the name of stability, under your rule from now on, it's only going to be flop. Do you see what I mean?

There won't be any more flips. You're not going to have the chance to argue, even where it would have been relevant to board panels in the past from boards appointed by both administrations. I have to point out to you to point out these factors.

A whole line of cases, which everybody has to agree have not been entirely consistent, are going to be eliminated under your rule. Yet you're saying—I don't know how you can say on the basis of that that the rule doesn't contemplate any change in the law.

Mr. GOULD. Well, I would say that the—to adopt your use of my terminology—that the flips have really been an aberration, that we did have a number of very unusual things happening at the board in the mid 1980's, and that one of the things was a departure from the approach that I referred to.

It is true that Chairman Miller articulated an approach to this issue which is different from the 50 years of precedent that I have alluded to. Yes, I think that stability and clarity and adherence to precedent is an important thing.

If the statutory supervisor issue, to take that example, isn't a good way to resolve it, we want to hear from you and everybody as to what is a good way to resolve it. You see, we have—the Court of Appeals for the Ninth Circuit in one of our cases said, well, 8 percent or 10 percent interchange of employees is exceedingly low.

Well, they didn't say it was. We haven't said, "Well, what isn't exceedingly low?" Do I have to roll the dice? Do I have to hire a lawyer? Do I have to engage in a crap-shoot every time one of these issues comes up?

Why can't we resolve these matters and avoid this system which is really operated as kind of a medieval priesthood. Why can't we avoid all of this gobbledygook and speak simply and clearly? And if we're through our proposed rule not devising the right flop, then you, Mr. Chairman, please tell us.

Members of the public, please tell us what it is that we should be doing in connection with answering these issues. I'm not saying that they are simple. I'm not saying that this proposed rule is

right. I'm not saying that I, as you pointed out, haven't contributed to this confusion.

But it is confusion and it is misleading. I apologize for contributing through signing that opinion to this confusion. I think your point is well-taken in that connection, Mr. Chairman.

Chairman TALENT. Well, we're now having encroaching upon us the confusing schedule of the Congress. So, what we're going to have to do, I think, is adjourn for a few minutes while we go vote.

Mr. Chairman, if you could stick around a while longer.

Mr. GOULD. Sure.

Chairman TALENT. I have a few more questions. We'll reconvene right after the vote back here. All right?

Mr. GOULD. Thank you, sir.

Chairman TALENT. Everybody can take a break.

[Recess.]

Chairman TALENT. One of the few advantages of not having very many Members attend is that it is easy to recongregate once you have had to go vote. Let me reconvene the hearing. I was in the middle of some questions for the chairman. I do appreciate your willingness to be around. I hope we can wrap up your part of this in a few minutes.

I want to say now before I forget that I am going to hold the record open for Members who want to submit statements or you, Mr. Chairman, if you want to submit something in addition. I'll hold it open—hold the record open for about 10 days—not about, we'll hold it open for 10 days.

Mr. Chairman, let me do a couple of things. One, I want to read into the record very briefly, not the whole thing, but the statements of Chairman Stevens, which were part of his comments when the notice of proposed rulemaking was issued.

It goes to this question of whether we are changing the law and, therefore, the results in a significant number of cases. He said: The inevitable consequence of the proposed rule is to overrule *sub silentio* the foregoing cases insofar as they hold that centralized control over labor relations is a material element.

Notwithstanding implications to the contrary, the application of the proposed rule to similar cases in the future will likely result in the single facility presumptions not being rebutted.

This is not a modest administrative change. It is a significant, substantive change in well-settled law. Also, from the case of Caribbean Restaurants, Inc., which was a case in which Chairman McCullough sat, I'm just going to note for the record that he considered at great length the highly integrated nature of the employer's operations and indeed the question of whether labor relations were centralized in control.

In fact, as I read the case, it went off on that issue. I'm just going to emphasize again to you, Mr. Chairman, that as I read a lot of these cases, they go off on that issue.

I might suggest that if you haven't done so—and I don't know whether you have or not—you might want to pull those cases that are cited by some of the commentators on the rule and see whether you think that they would come out differently.

Now let me go to a different point. It's related to it, but it's a concern that I have in the course of this. I'll go to the whole effi-

ciency question, and it will lead into the next line of questions. I'm going to try and be reasonably brief in doing this.

The statements submitted by the—again, the chain restaurants indicate they have a graph, which I'll be happy to send over to the board, published decisions. These are published decisions regarding the appropriateness of single- versus multi-facility bargaining units.

The graph pretty clearly indicates that the number of those decisions is going down as the years go by, and in fact that from 1985 through 1990, there were only 11. From 1990 through 1994, there were only 11, and then in 1995 there were zero out of, I think you estimated before about 900 published decisions of the board.

Now, I will grant you that the unpublished decisions, there are a lot of unpublished decisions of the board. But wouldn't this suggest to you that this area of the law is not a great burden on your caseload when you had no published decisions in 1995 relating to it?

Mr. GOULD. Let me say two things, Mr. Chairman. One is, it would suggest to me that the single-unit presumption is through the adjudication process being decided usually in favor of the single—single facility, the single-facility presumption.

This is an issue which recurs and continues to come to us. We can only justify publishing cases in the main where there is some new issue, where we haven't been dealing with the case time and time again.

I know personally, I can tell you that there are a number of cases in my 2 years on the board that have come to me involving this issue. The overwhelming number of them we don't publish.

I just want to say something with regard to your comment about Chairman Stevens. That is, I think the best indication of what Chairman Stevens really thinks about this issue is in his written decisions prior to the time that this issue arose and became ultimately, if I can read according to what the press tells me, a controversial matter.

In *Red Lobster*, the *Red Lobster* decision, 300 NLRB 124, Chairman Stevens and members Craig, Kraft and Devaney, in dealing with the case where the unions sought 1 of 13 restaurants in the Detroit area and the union sought to represent employees in separate units of two area locations.

In finding that these units were appropriate, the ones that the—single-facility units the union sought, the board, with Chairman Stevens signing the opinion, said, "In agreement with the regional director, we conclude that the evidence presented by the employer fails to overcome the presumption that the requested single-location units are appropriate.

"In support of this conclusion, we find that the general managers of the two restaurants in question retain a meaningful amount of autonomy and that the evidence concerning employee interchange is not sufficient to require broader units than those requested."

Now, again, I think that—and I would have to go back and look at the opinion of Chairman McCullough said, before responding to that. Because it's not something that I've looked at recently.

Chairman TALENT. Sure. I want to recognize, I'm not expecting—I was reading those for the record and to make a general point. I'm

not expecting you to distinguish in any detailed way these cases which—I only read them last night. Otherwise, I would have let you know.

Mr. GOULD. Some of them can't be distinguished, Mr. Chairman. That's one of my basic points here, that we've got to create some more certainty in order to avoid wasteful litigation. Some of the—

Chairman TALENT. Well, if they can't be distinguished, then aren't you, as member Stevens said, effectively overruling them with this rule?

Mr. GOULD. Well, there are—I'm sure that Chairman Stevens can point to some cases which are there which could be said to be, as he put it, a sub silentio reversal.

I think the essential point that I want to make you though is, that if you look at the entire 50 years of history, the abiding theme in these cases is that the three criteria that we have focused upon, geographical separation, employee interchange, and local autonomy are the critical decisions.

You can find anything over those 50—you can find cases over those 50-year decisions which are an aberration which will—and I think that what Chairman Stevens found in the document that you refer to is, quite frankly, an aberration.

I think his opinion in 1990, before this issue came before the board, reflects his thinking and the thinking of the board. I might say that, although I refer to the 1980's, it's interesting to note that Chairman Dodson in a case called Essenbach-Boysa, 268 NLRB 77, 1984, in this case the board pointed out that managerial responsibility is split between Essenbach, the executive, the president, and the two managers employed at each store.

In addition to spending 3 days a week at each store, Essenbach calls the managers at the store when he is not present. Essenbach makes the major managerial decisions concerning the restaurants and decides the number of people to be hired.

Essenbach, the president, central—on a central basis, sets pay rates, overall terms and conditions of employment. The Board Chairman Dodson said that although he reserves for himself many management prerogatives, he necessarily must leave many of the day-to-day decisions concerning the restaurants of his managers—concerning the restaurants to his managers.

These managers interview and hire employees, grant time off and resolve problems. It thus appears that the employees at this one facility, the Milwaukee restaurant, have a separate community of interest.

Now, these are the opinions which reflect the broad thrust of 50 years of precedent. I think that there are the occasional decisions which come up, which depart from this broad theme.

What I have presented to you and what this rule for criteria—this rule focuses upon—represents what we have come back to time and time again as a basis for deciding these cases.

Chairman TALENT. Again, that's precisely the point. You just read the factors in that case Chairman Dodson thought significant that would not have been material and would not have been admissible in a hearing based on the proposed rule once it was established that a statutory supervisor was present.

A person could be a statutory supervisor without exercising the attributes that you just mentioned. I mean, it seems to me, Mr. Chairman, you are making the point that the board time and again has gone off on issues relating to centralization of labor relations that simply are not necessarily admissible as part of a determination of whether somebody is a statutory supervisor.

Mr. GOULD. Well, if we look at the issue——

Chairman TALENT. Which is the only thing that would be material under your rubric.

Mr. GOULD. If we look at the factors, the items which Chairman Dodson found to be appropriate in the Essenbach decision, they are the kinds of problems that a supervisor, as defined in Section 2, Subsection 11, would deal with. You couldn't be a supervisor unless you have responsibility for the matters that Chairman Dodson referred to.

Chairman TALENT. You don't need that wide range of responsibility though, do you, to be a supervisor? Isn't it enough, for example, just to direct the work force without having control over those kinds of day-to-day decisions?

Mr. GOULD. You don't need to deal with all of the issues that were dealt with here. Yes, that's correct.

Chairman TALENT. A couple of other points. You mentioned that even under the rule everybody would have a right to a hearing. I certainly agree with you that there would be a hearing on the unit question.

But would you not agree with me that under the proposed rule very substantial amounts of evidence that in the past would have been admissible as relevant to the board's decision would not be admissible?

So that, in effect, yes, you have a hearing, but you can't introduce evidence. I mean, in other words, it's like you're saying before, you're saving money because people don't have to hire lawyers. But isn't that because they basically just lose? I mean, you don't hire a lawyer, but you lose.

The whole point you're making about the increased efficiency of the rule means that substantial amounts of evidence that the board had considered to be relevant before are no longer even going to be admissible.

Mr. GOULD. Well, the evidence that would be placed if an employer wanted to rebut geographical separation and local autonomy that would be introduced would be relating to interchange, although again—employee interchange.

Although again, the employee—the employer could, and I know that Chairman Stevens and others have referred derisively to this language as simply hire a calculator, a statistician, and tell them in advance which side of the numbers they're going to be on.

You wouldn't have a situation where the Court of Appeals for the Ninth Circuit said this is exceedingly low and we said this is exceedingly low and not know what is satisfactory. You would know where you are.

I think, Mr. Chairman, I hope you would join me in supporting the proposition that that really, particularly in today's litigious environment, and I know that many of your colleagues are concerned

about the amount of litigation taking place in our society. That would be a good thing.

Chairman TALENT. Mr. Chairman, let me say to you that I have been encouraged by your statements at the hearing that you remain, and as far as you know, I suppose the rest of the board members remain very flexible as to what factors might be eventually adopted in a new rule.

You're the expert on these things. You certainly are in a better position to determine whether some rule could be fashioned that would achieve both clarity and fairness and would in fact not change board law.

In fact, it sounds to me like you don't—at least that you are not initiating this rulemaking with the intent of changing board law. So, it may be possible by perhaps adding a couple of factors or changing how you define some to eliminate some of the concerns I've had if, at the end of the day, you end up perhaps agreeing with some of them.

It's certainly going to be, from the standpoint of administrative action, your purview and not mine. I am trying to point them out at this hearing and the concerns that I had. Let me raise another concern that I've got with you. I don't know what you're planning to do about this.

But let me just outline a scenario that would be of some concern to me. In my judgment, if the courts on appeal of this rule believe that it changes substantially the parameters of board law and results—would result in different results and on significant number of cases, and you have promulgated the rule on the assumption that it won't, it is going to be very vulnerable to judicial challenge.

Now, I am asking a hypothetical, the premise of which I know you would deny. But there's a point to it. So, there is an aspect to this that you can address. If that is the case, then you may end up with exactly the opposite of what you're seeking.

Because if I were a litigant and I thought, and the board hands down this rule, and I know the decision regarding appropriateness is going to be made pursuant to the rule, I would be encouraged to make offers of proof regarding things like centralization of labor relations and functional integration even if I felt that under the old law I wouldn't win on that.

Because if I make the offer of proof and eventually, years from now, the courts end up reversing and remanding the rule, then my case is going to have to be reopened. Then we will have the situation that Ms. Velázquez raised, which I certainly agree happens out there, where an employer simply from his perspective postponed the evil day when he has to bargain with the union that has legitimately organized his unit.

So how have you thought about that at all, how you might handle this so that you don't have a situation where a couple of years down the road if the courts end up dumping the rule that you've got a whole lot of cases that have to be reopened? Are you going to hold cases pending litigation? Or is it just simply premature to consider this?

Mr. GOULD. Well, we haven't addressed that issue. Perhaps that is an issue that we, as a board, should address. We have not considered that, Mr. Chairman.

Chairman TALENT. I would just simply say think about that context. Because there's a lot of people here who believe. Mr. Skelton said that what's the point of all this?

It's clearly, I think, the interest is such that there is a lot of people who are involved in business or in labor law who believe that this is going to have a practical impact other than administrative efficiency on what they do.

Now, maybe they are all wrong. But if they're not all wrong and they prove to the courts that, then it seems to me we're in a situation where we have a rule that's in some danger. Because, of course, the courts will defer to your expertise, assuming that you are exercising it with regard.

If you simply don't—decline to consider something because you don't think it's relevant and the court finds that it is, that's the kind of situation where a rule gets overturned. I don't want these cases, and I know you don't, that you see you have to go back and reconsider a bunch of rules.

One other point I want to get to because it particularly implicates this Subcommittee, the Regulatory Flexibility Act. Now, my understanding is, the board has not done a reg flex analysis. Is that correct? Tell me and then tell me why you haven't done it.

Mr. GOULD. Yes, sir. Section 605 of the Regulatory Flexibility Act provides that a flexibility analysis need not accompany a notice of proposed rulemaking providing that the head of the Agency certifies that the rule will not have a significant impact on a substantial number of small entities.

As I've indicated, this will have an economic benefit, if anything, for small business because it will make them less reliant upon litigation. The statute also says that compliance or noncompliance with the Regulatory Flexibility Analysis shall not be the subject of a review.

One of the leading opinions on this is written by Justice—Judge, as he was then—Scalia, Thompson against Clark, which have upheld this principle. I would say additionally that we don't believe that the effects of our rule are susceptible to the kind of scientific dollar amount study that are normally contained in a Regulatory Flexibility Analysis.

But, of course, again I want to say that we are very anxious to hear from small business, as well as all business, on what their view of the impact of this rule is.

Chairman TALENT. Well, let me just suggest that even if you believe the rule would have a beneficial aspect to small business, as I understand its implementation of the Reg Flex Law, you are supposed to conduct the analysis even in those circumstances that Congressional Record, when the bill was passed.

I'm sorry Mr. Skelton isn't here because I know he is very interested in this, how this law operates. Indicates that: "Agencies may undertake initiatives which would directly benefit such small entities. Thus, the term significant economic impact is neutral with respect to whether such impact is beneficial or adverse."

The statute was designed not only to avoid harm to small entities, but also to promote the growth and well-being of such entities. You may want to consider that.

Mr. GOULD. I might just say also, Mr. Chairman, that the finding that we arrived at here in this situation the Regulatory—the flexibility analysis was not required is consistent with the approach that we employed in acute health care, which was where the Supreme Court upheld our rulemaking initiative.

Chairman TALENT. Well, in part, I am advocating for the act, because one of the reasons why we unanimously pass out of this Subcommittee and to the floor a law putting some judicial review into regulatory flex analysis is that too many agencies were just being perfunctory with regard to it.

I'm not suggesting the board is doing that. Certainly you haven't passed enough rules to be an offender in this kind of thing. But, on behalf of the Small Business Committee, let me suggest that really, there is a very strong bipartisan consensus on behalf of agencies doing this.

I would hope that you would reconsider. One other point I want to make, now, we talked about published decisions. We don't know how many unpublished decisions the board has made with regard to this issue. Isn't that correct? We just don't know?

Mr. GOULD. That's correct. I did conduct a review of the 1994 decisions, but we don't know the total. As I indicated, I think I indicated to you why we don't know.

Chairman TALENT. Right.

Mr. GOULD. We don't have—

Chairman TALENT. Resources.

Mr. GOULD [continuing]. a retrieval system.

Chairman TALENT. There simply is no empirical evidence, other than subjective opinions on the part of people working at the board, who certainly are in a position to have informed, subjective opinions.

But there isn't any objective evidence about how much of the board's resources or litigant resources are spent on this cases, whether that is increasing over time or declining over time. I mean, isn't that correct?

Mr. GOULD. Well, we know that the issue is a recurring one, notwithstanding the fact that the doctrine has been well settled for more than 3 decades.

Chairman TALENT. Right. But we don't have any objective evidence about whether the resources you're expending on this are increasing or decreasing over time. That's what I'm asking.

Mr. GOULD. We don't know whether they are increasing or decreasing. All that we do know is that these issues come to us with a fair amount of frequency.

Chairman TALENT. I thank you for your patience. Ms. Velázquez, have you more questions?

Ms. VELÁZQUEZ. I just would like to ask one question to Mr. Gould.

Mr. Chairman, do you feel that this rule in any way is sacrificing businesses in the name of stability?

Mr. GOULD. I'm sorry, I missed the first part of your question.

Ms. VELÁZQUEZ. If you feel that in any way this rule is sacrificing businesses in the name of stability.

Mr. GOULD. Not at all. I think that this is promoting the interests of business, particularly small business. I say this, not only be-

cause of the fact that the existing system is imprecise and not advising the small businessman or woman about where they stand, but also because we look at so many criteria.

Nobody knows by looking at the criteria, most of which we disregard in fact, what we're going to rely upon. Nobody knows where they stand. It is the fact that we make these decisions based upon, as we say so frequently, all of the circumstances.

That is really, truly arbitrary and imposes a burden upon business. That's why I think that this rule, this proposed rule, the approach that we're taking will lessen the burden upon interest and enhance the competitiveness of American industry, and be fair to both employer and employee.

Ms. VELÁZQUEZ. Thank you, Mr. Chairman.

Chairman TALENT. I thank the gentle lady, and again, I want to thank you for your patience, Mr. Chairman. You have indulged me greatly, and I appreciate that. The opportunity to discuss these kinds of issues with an authority such as yourself brings back the old days when I did this on a routine basis.

So, I do appreciate the opportunity. I think this is a very important issue about which there has been a lot of interest. Again, I want to thank you for being here.

Mr. GOULD. Thank you, Mr. Chairman. It's a pleasure to see you again.

Chairman TALENT. We will move immediately to the next panel, because we took a long time with the first one. So, as soon as the Chairman and his staff leave, if they would come forward.

I will try with this panel to stick to the 5-minute limit. I know that some people have travelled here and I'm grateful for that. I'm not going to cut people off.

[Recess.]

Chairman TALENT. All right. You have all thoughtfully lined up in accordance with the names we have there. That's nice of you. We'll just go from our left to right here, if that's OK. I will introduce witnesses as their time to testify comes up.

Again, I'm going to ask you if you can to summarize your testimony if it's longer than 5 minutes. On the other hand, and particularly for those witnesses who have come a long distance, if there is anything you feel it's important to say, I want you to feel free to say it.

Our first witness in the second panel is Mr. James Coleman, who is the general counsel for the National Council of Chain Restaurants from Arlington, Virginia.

Mr. Coleman, please go ahead.

TESTIMONY OF JAMES COLEMAN, GENERAL COUNSEL, NATIONAL COUNCIL OF CHAIN RESTAURANTS

Mr. COLEMAN. Thank you, Mr. Chairman and Congresswoman. As you have stated, I am here in my capacity as general counsel of the National Council of Chain Restaurants. The council is a Washington, DC trade industry group which represents approximately 40 of the Nation's multiunit, multi-State chain restaurant companies.

Collectively, these 40 companies own and operate approximately 30,000 restaurant establishments. Then through franchise and li-

censing agreements, an additional 50,000 establishments are operated under their trademarks. In many cases, these are done by individuals who act in the capacity of owner/operator.

Mr. Chairman, I am going to try to be very brief, and stay within your rule. I note that the council's testimony has been referenced somewhat extensively already, so I'm going to try to be even briefer than I would have otherwise. But I would ask that our written testimony be entered into the record.

Chairman TALENT. Without objection. That will be the case for everybody who summarizes.

Mr. COLEMAN. It's the council's position that the adoption of a rule that sets forth a virtually irrebuttable presumption that a single-location unit is appropriate absent extraordinary circumstances is unwise and would be counterproductive because of the adverse impact that such a rule would have on the growth and expansion of restaurants and other small retail businesses.

The board has now rejected the multi-factor test it has applied for well over 30 years to fashion its proposed rule, which is based on three very limited criteria. With one broad stroke, the board will eliminate 30-plus years of well-established precedent by determining that the currently recognized factors of functional integration, centralized management control, common skills, employee transfers and bargaining history will in the future be considered nonmaterial.

The board did not support its decision to eliminate these additional factors with specific case law, but rather, simply engaged in what we believe is second-guessing of prior board decisions.

The board's proposed rule simply fails to deal with the underlying reality of most businesses, which it reluctantly acknowledges require centralized control and functional integration of its retail operations.

In its notice of proposed rulemaking, the board stated, "Few businesses today with more than one location fail to maintain centralized control over the conduct of operations. It is a matter of good business practice."

In view of the board's recognition that more businesses exercise common control of employment and labor practices at geographically independent locations, it is arbitrary for the board to state that centralized control is a non-material factor in its analysis regarding the appropriateness of single-location bargaining units.

If the period from 1980 through 1994 of the board's history is any measure of the future, ignoring these additional factors demonstrates that in approximately one-half of the cases, the board will find that a single facility unit is appropriate, where under the prior test, based on the same or similar factual record, the single facility unit would have been held to be inappropriate.

Chairman TALENT. Where is that from your testimony? What page is it on?

Mr. COLEMAN. Oh, I'm sorry.

Chairman TALENT. No, that's OK. I want to refer to it. I assumed you were reading it.

Mr. COLEMAN. It's the top of page 7.

Chairman TALENT. Seven.

Mr. COLEMAN. Right about there in the middle, "In proposing the instant rule."

Chairman TALENT. Thank you.

Mr. COLEMAN. The history of the chain restaurant and retail industry adjudication of this issue has made it clear that the presumption of a single facility location has been rebutted on numerous occasions, given the centralization of management in this industry.

Now, if the board inexplicably seeks to group the restaurant industry and retail industry with every other industry except for public utilities, construction and ocean-going vessels. In proposing the rule, the board fails to take into account the fact that the chain restaurant industry is different from other industries in the operational requirements for uniformity of policies and procedures.

This uniformity is demonstrated by many chain restaurants having identical exterior and interior designs, offering the same limited number of food and beverage items at a uniform price, having identical hours of operation, requiring employees to wear the same or similar uniforms during working hours, and maintaining the same labor and employee relations policies and rates of pay.

The board has found it significant that chain restaurants conduct business under standardized policies and procedures, subject to close centralized control. Prior board decisions also clearly indicate that the chain restaurants tend to be highly integrated enterprises. This trend will no doubt continue, given the widespread advances in new technology.

Two of the board's stated reasons for proposing the rule are, one, that the historical likelihood is that in most cases a single facility will be found to be appropriate, and two, that there is extensive litigation currently involved and there are delays associated with that litigation.

A review of past board decisions reveals that the board's reasons for the rule are not supported based on past experience or by any empirical evidence that we have been able to review.

During the period of 1980 through 1994 there were 61 reported board decisions regarding the appropriateness of a single facility bargaining unit. In 33 of those cases, the board held that the single facility was not an appropriate bargaining unit. In only 28 cases did the board find that the single facility was the appropriate bargaining unit.

Given the fact that the board determined that a single location unit was not appropriate in the majority of its decisions published during the past 15-year period, the Agency should not now promulgate a rule which would create an irrebuttable presumption that the single facility is appropriate.

The board has not supported the proposed rule with any empirical evidence of extensive litigation or delay. A review of the reported decisions by the board during the 35-year period of 1960 through 1995, reveals that litigation regarding the appropriateness of a single location unit has declined tremendously.

I would just like to briefly direct attention to the chart, Mr. Chairman, that you held up that is attached to our written testimony and is here in a blown-up version. I direct the Subcommittee's attention briefly to that chart, which reflects the total number

of cases involving this issue in 5-year increments that were published in board decisions.

As you can see, the largest number of published board decisions regarding this issue were decided during the 5-year period between 1965 and 1969. Seventy-three such decisions were issued.

After this period, the number of published decisions concerning the issue have declined dramatically, with only 11 cases having been published during the 5-year periods from 1985 through 1989 and 1990 through 1994, respectively.

In fact, during 1995, there were no published board decisions concerning this issue. Thus, the board has averaged only two published decisions per year during the past 5 years. Obviously, we believe the board's premise regarding "extensive litigation currently involved" is in fact contradicted by the board's own published decisions.

In conclusion, the council submits that the board's proposed rule will not achieve the goals announced by the board. The multifactor test currently relied upon by the board has worked well for well over 30 years and it is the council's position that there is no valid reason to change board case law and procedure at this time.

Accordingly, the council respectfully urges the board to refrain from engaging in the proposed rulemaking. Thank you.

Chairman TALENT. I thank you, Mr. Coleman.

Our next witness is Ms. Haunani Kekuna, chairwoman of the Franchisee Advisory Council of the Coffee Beanery Advisory council, K&I, and also operator and owner, I think, of K&I Management from Allentown, Pennsylvania.

[Mr. Coleman's statement may be found in the appendix.]

TESTIMONY OF HAUNANI SUE LIN KEKUNA, K&I MANAGEMENT/THE COFFEE BEANERY

Ms. KEKUNA. Thank you, Mr. Chairman and Congresswoman. My name is Haunani Kekuna and I am appearing here today on behalf of the International Franchise Association. The International Franchise Association is the oldest and largest trade organization that represents both franchisors and franchisees.

Since 1960, the IFA has worked to promote a healthy and vibrant regulatory climate for the successful expansion of franchising. IFA members include some of the most recognized names in the retail and service industries who have proven that franchising provides unique advantages over traditional methods of distributing goods and services.

Franchising works in many different industries because its unique flexibility allows franchise companies to respond quickly to changes in the marketplace, in a competitive marketplace. I am here to share IFA's opposition to the rule proposed by the National Labor Relations Board.

Small businesses like mine are faced with countless challenges to their success. To add another Government burden like the proposed rule will further diminish our chances for success, as Congressman Longley already articulated from his constituents.

This proposal would deny small businesses like mine the opportunity to show at a hearing the reasons why single unit organizing may not be advantageous or fair for either the management or the

employees in an integrated, multiunit business like many franchises.

In addition, there appears to be no compelling reason to change the current practice of evaluating single unit organizing requests on a case-by-case basis. For any retail or service organization or operation, labor costs are a major component of the total costs of running the business.

Increases in workers' and unemployment compensation taxes, health care and health insurance costs and other employee benefits already limit the ability of many U.S. small businesses to compete in a global marketplace.

The proposed NLRB rule further threatens our ability to compete globally and to maintain uniformity and consistency within the organization. This is especially important in a franchised business, which depends on a seamless and transparent set of relationships to deliver customers a consistent and reliable experience.

If enacted, this rule will expand the likelihood of increased costs, limiting our ability to create jobs and opportunities for our current and future employees, as well as their families.

In addition, we oppose this rule because it implies that all situations fit neatly within the confines of a single rule and because it creates a rigid and inflexible structure that ignores the realities of the marketplace in which, as small businesses, struggle daily to compete.

I am president and founder of K&I Management, Inc., a company that operates three gourmet franchise units in the Philadelphia area. We have been in business since 1988 and annually employ 30 to 50 employees.

Our experience is similar to that of many thousands of small businesses around the United States. Like many franchisees, I operate more than one unit. During the course of any business week I have many employees and managers working at several different units, depending on the time of the year, the level of activity at certain stores, and the travel and family schedules of my employees.

Though I operate several locations, the management and operational control for the entire business is mine. I do not manage each unit independently, but rather, manage each unit as part of an integrated whole. The proposed rule would treat each of my units as if it were an independently operated business and ignores the fact that while there are multiple locations, the centralized management function is essential to success.

Of the nearly 550,000 franchised businesses in the U.S., many are operated by businessmen and businesswomen like me who have more than one location. The proposed rule is a threat to all of these small businesses, who would no longer have an opportunity to demonstrate at a hearing the similarity of skills, functions, and working conditions of their employees, the centrality of control of their businesses, and the degree of employee interaction within those businesses.

All of these are factual determinations which potentially argue against single unit organizing, but as questions of fact would not be adequately explored under the NLRB's proposed rule.

In the interests of time and expediency, the proposed rule would deny me a fundamental right: The opportunity to state my case

and explain the essential nature of centralized management to a franchised business.

Small business in general, and franchising in particular, have consistently been job creators during the past decade. As Fortune 500 companies lay off thousands of employees, those of us who operate small, independent businesses have successfully created employment opportunities and wealth for literally millions of Americans and their families.

If our Nation is to enjoy the blessings of this successful pattern of employment opportunity and wealth creation, the Federal Government must not further burden small businesses and their employees and families with costly and unnecessary regulations.

On behalf of the members of the International Franchise Association and the thousands of other small businesses, owners and operators around the country, I urge the Subcommittee to communicate our opposition to this rule to the NLRB and ask the proposed rule be withdrawn.

Thank you for the opportunity to be here today.

Chairman TALENT. Thank you, Ms. Kekuna.

The next witness is Mr. Rock Magnan, vice president of operations of Con-Way Transportation Services, Inc. of Menlo Park, California.

You have come a long way, sir, and we appreciate it.

[Mr. Ms. KeKuna's statement may be found in the appendix.]

TESTIMONY OF ROCK MAGNAN, VICE PRESIDENT- OPERATIONS, CON-WAY TRANSPORTATION SERVICES

Mr. MAGNAN. Good afternoon, Mr. Chairman and Congresswoman Velázquez. As stated, my name is Rock Magnan. I am vice president of operations for Con-Way Transportation Services in Menlo Park, California.

We operate three less-than-truckload carriers and a nationwide over-the-road and intermodal truckload company. We opened for business in 1983 and have grown to \$1.3 billion in revenues in 1995. We employ 14,000 employees in all 50 States and in Canada.

CTS is not a small business. We have over 300 service centers ranging in size from 2 employees to over 500. Most facilities have managers on site, but well over 100 do not. The issue of single location bargaining units in representation cases is important to the trucking industry, whether the firm is a small business or a national transportation company like CTS.

Congress began to deregulate the trucking industry in 1980. The companies that survived and thrived under these new, freer market conditions found new efficiencies, reduced costs, and improved their service.

The key elements to success in today's trucking environment are a system-wide approach to planning and coordination, flexibility to meet customers' needs and a quality team of drivers.

We use a computerized system of dispatch at centralized locations to efficiently plan routes and schedules on a daily basis, to meet our on-time service standards and reduce our costs. Drivers work at various functions during the course of the work day from dock, to pickup and delivery, to line haul, and perform light maintenance duties.

The interaction of service centers and drivers is a way of life for our trucking company. The line haul, or what we call the freight-flow operation of our company, is how we move freight between service centers. Drivers move freight from facility to facility. They work on a common dock with employees from various locations to drop off freight and coordinate loads.

Our drivers run what we call a meet-and-turn operation, which runs much like the old Pony Express operation. Drivers from various locations meet at various truck stops or sites along the highway to exchange freight, to move freight in a relay fashion across our system.

Without centralized freight flow control and dispatch and commonality of work rules, a system-wide line haul operation would be almost impossible to manage. An operating environment with multiple contracts, various labor unions and a variety of work rules would render us noncompetitive in today's market.

In our business there should not be the presumption that a single facility is an appropriate bargaining unit. A trucking company must function as an organized system to be competitive and service-sensitive.

The NLRB should continue to allow inquiries into the facts of integration of operation, centralization of labor relations, and the community of interests of the employees, as well as the viability of the bargaining unit to determine if a bargaining unit is appropriate.

Thank you, Mr. Chairman.

Chairman TALENT. Thank you, Mr. Magnan.

Next witness, Mr. Harold Coxson of Coleman, Coxson, Penello, Fogleman and Cowen, for the American Bankers Association, Washington, DC.

[Mr. Magnan's statement may be found in the appendix.]

TESTIMONY OF HAROLD P. COXSON, AMERICAN BANKERS ASSOCIATION

Mr. COXSON. Thank you, Mr. Chairman, and Ms. Velázquez. I am here today representing the American Bankers Association. I would also note that I serve as 1 of 25 lawyers on the NLRB's Management Advisory Panel, selected by the current chairman and members of the National Labor Relations Board.

Banking is perhaps the most regulated industry in the United States. As a result of such extensive regulations, bank operations are, by necessity, highly centralized and fully functionally integrated. This makes banks particularly ill-suited for single-branch bargaining units, which would result in the proliferation and fragmentation of small groups of employees for purposes of union organizing and collective bargaining.

Federal regulatory monitoring requires a high degree of standardization of all bank activities and mandates uniform procedures in all branches and head offices. Today there are 10,000 commercial banks in the United States, of which more than 4,200 operate two or more branches.

A typical small bank has two branches. Larger institutions operate hundreds of branches. Many of these branches are virtually identical, with identical procedures, operations and personnel poli-

cies, with nearly identical employee skills, functions and working conditions, and with little real local autonomy on labor relations practices.

Mr. Chairman, the banks' real concern with this rule is not that unions will organize employees in the industry—that's up to the employees involved—but that the rule will result in unreasonably fragmented, chaotic, unstable collective bargaining relationships with individual branches being organized and represented for purposes of collective bargaining by multiple unions with multiple contract expirations and different contract terms and work rules. This flies in the face of other Federal regulations in the banking industry which require highly centralized and functional integration of banks.

Mr. Chairman, this is not a minor issue for banks, despite what NLRB Chairman Gould describes as a "crap-shoot." What he calls a "crap-shoot"—unit determination—is at the heart of our collective bargaining system, which even the most basic text on labor law acknowledges. Unit determination provides the initial context in which employees may exercise their right to freedom of choice, as well as the basic framework within which collective bargaining will either succeed or fail.

As the NLRB stated over 30 years ago, if the NLRB's unit determination fails to relate to the factual situation with which the parties must deal, efficient and stable collective bargaining is undermined, rather than fostered.

Chairman TALENT. Where are you in the statement, Mr. Coxson?

Mr. COXSON. Page 3.

Chairman TALENT. Three. Good.

Mr. COXSON. The Supreme Court has emphasized that the test of an appropriate bargaining unit is not susceptible to inflexible rules; in fact, the determination should be flexible, taking into account the factual circumstances of each workplace.

While the board has established certain presumptions in favor of single facility bargaining units, including such a presumption in the banking industry, it has been careful to consider specific factors in a case-by-case analysis which may rebut such presumptions.

In *Hawaii National Bank*, for example, then-NLRB Chairman Miller stated, "Because of the highly integrated functional operation of banks generally, we ought to closely scrutinize the facts in each individual case arising in the banking industry, applying no preconceived notions or presumptions." Since *Hawaii National Bank*, the board has applied the single facility presumption to banks with only mixed success in the courts.

The NLRB's proposed rule is disappointing because it substitutes a mechanical-mathematical rule for carefully reasoned analysis on a case-by-case basis. After nearly 60 years of judicial deference to the board's substantive expertise based on careful, case-by-case analysis of unit determinations, the board now proposes inflexible rulemaking. Even in light of today's complex new workplace operations, organizational structures and rapid technological developments, the Agency now announces that it merely needs to apply an inflexible mechanical rule for unit determinations.

In a recent speech, Chairman Gould denigrates unit determinations—this once important and proud function of the Agency and

the job duties of countless professional board staff—to a simple administrative task, by announcing that in his view the proposed rule only requires a calculator and an odometer to administer.

The proposed rule totally eliminates from consideration by the board and the Federal courts the most critical and most relevant factors in unit determinations in the banking industry which, if given their deserved weight in the reality of today's banking operations, would tend to rebut the single location presumption in banking units. Conversely, the only factors the NLRB will now consider in unit determinations are the least relevant to banks and are skewed in favor of single location units.

The narrow "extraordinary circumstances" exception relying on the "temporary interchange of employees" seems to suggest that the only way for banks to avoid fragmented single facility units is to keep their employees on a conveyor belt between branches through frequent interchange.

The proposed rule also will, in effect, give controlling weight to the "extent of organizing" as dictated by the union's petitioned-for unit. This, despite the clear prohibition on that practice contained in Section 9(c)(5) of the National Labor Relations Act. That section was added by Congress in 1947 to prevent the NLRB from conducting representation elections involving only those employees the union thinks it can count on to vote for it. To return to the abuses of the past by permitting the union to gerrymander a petitioned-for unit would frustrate the basic objectives of unit determination.

By analogy to Congressional elections, challengers to incumbent Members of Congress should not be permitted to count only the votes from those parts of an established congressional district which may be more favorable to the challenger nor to allow the challenger to redefine the district's boundaries in each election to better suit the challenger's election prospects.

Congressional districts, like appropriate bargaining units, should be drawn on the basis of a variety of factors, the most fundamental of which is a "community of interest" among voters which must exist if an elected official is to govern effectively, just as must exist if a union is to represent its members and bargain effectively. Ignoring the common interest of employees by pitting employees at one branch against those of another branch where one branch is represented by a union and others are unrepresented, or where branches are represented by different unions, will create friction in employee relations and chaos in labor relations.

It will undermine, rather than foster, stable collective bargaining. That is not in the best interests of either employers or employees.

Mr. Chairman, the American Bankers Association respectfully suggests that the proposed rule should be withdrawn. While NLRB Chairman Gould's reference to the Agency's need for only a calculator and odometer to administer the rule is undoubtedly a rhetorical flourish, if the proposed rule is promulgated it does suggest an apparent ability to reduce the board's budget rather substantially and cut, if not eliminate, staff resources currently devoted to this area of the Agency's specialized expertise.

The board should keep the record open for additional comments and schedule hearings. What Chairman Gould refers to as "proce-

dural overkill"—the scheduling of an NLRB hearing—is really nothing more than due process. I guess the question is whether we in the business community will be duly processed.

Delaying promulgation of the proposed rule is compelled also by board tradition, where it has been a consistent practice not to reverse legal precedent or make major procedural or substantive changes, absent a full complement of confirmed members on the board, nor to make such changes based on the vote of a recess appointee to the board.

If the board does promulgate a final rule, Congress should consider the most appropriate means of reversing that rule, either through specific appropriations riders or a legislative amendment.

Thank you.

Chairman TALENT. Thank you.

Our next witness is Joann Shaw, Society for Human Resource Management from Chicago, Illinois.

[Mr. Coxson's statement may be found in the appendix.]

TESTIMONY OF JOANN M. SHAW, UNIVERSITY OF CHICAGO HOSPITALS

Ms. SHAW. Good afternoon, Mr. Chairman and Congresswoman Velázquez. My name is JoAnn Shaw. I am vice president of Human Resources and Support Services at the University of Chicago Hospitals and Health Systems.

I am appearing today on behalf of the Society for Human Resource Management, SHRM, and the American Society for Healthcare Human Resources Administrators, ASHHRA. SHRM, the leading voice of the human resource profession, represents the interest of more than 70,000 professional and student members from around the world.

Fifty-seven percent of our SHRM members are from companies with less than 1,000 employees. ASHHRA is a professional membership group of the American Hospital Association. ASHHRA membership is made up of chief human resource officers from healthcare organizations throughout the country, many from academic medical centers, many from small community hospitals.

This is the first time that SHRM and ASHHRA have had the opportunity to present joint testimony before the Congress. I have over 22 years of experience as a human resources professional. I truly appreciate the opportunity to testify regarding the National Labor Relations Board's proposed rule related to single location bargaining units in representation cases.

If adopted, this rule would automatically make a single location unit appropriate for collective bargaining purposes, unless at the outset an employer can establish that extraordinary circumstances exist. It is apparent that the extraordinary circumstance exception will be exceedingly narrow.

The healthcare industry is at a critical juncture today. We are all struggling to control costs so that our services to our patients can be widely accessible to the public at large and so that healthcare costs do not unduly burden our economy. At the same time, we are opening satellite community clinics and facilities to increase the accessibility of our patient services throughout society.

By opening these small satellites in various communities, we hope to encourage all members of society the ability to obtain better health care. Obviously, opening and maintaining these community-based satellites has a cost attached to it.

In order for these operations to be economically viable, we must do all that we can to minimize the administrative costs and our overhead. The board's proposed rule profoundly concerns us because it would have precisely the opposite effect.

Indeed, we believe that its application to our industry would be contrary to Congress' admonition against the proliferation of bargaining units when it extended the NLRA application to the healthcare industry in 1974.

Under current NLRB rules, each healthcare institution has the potential for, at most, eight bargaining units. However, it is not uncommon for community-based operations to be open just a few miles apart.

If this proposed rule is adopted and applied to our industry, we face the substantial likelihood that the healthcare industry could have as many as 40 potential bargaining units. This would be true no matter how the institution is structured or the degree to which its facilities are integrated.

We are deeply concerned that the probable proliferation of potential bargaining units at each new clinic or other ambulatory care facility will discourage many institutions from opening new, vital community healthcare operations.

Further, if such small community facilities are opened and are confronted with multiple bargaining units, their continued economic viability may very well be jeopardized. The healthcare industry understands and appreciates the fact that the act encourages collective bargaining.

We embrace the principle as well. We simply desire doing so on a basis that is practical and efficient, so that it does not impair our ability to provide our services as broadly as possible. We firmly believe that this goal is better served by permitting our industry to continue to have the opportunity to have historical single location unit factors adjudicated.

An automatic, almost conclusive presumption that each of our facilities constitutes a springboard for several additional bargaining units will impede the availability of healthcare services to our community at large.

Thank you very much for the opportunity to testify.

Chairman TALENT. Thank you, Ms. Shaw, for that testimony.

Our next witness is a very distinguished actor in the field of labor law, Mr. Curtis Mack, counsel of the International Mass Retail Association from Arlington, Virginia.

[Ms. Shaw's statement may be found in the appendix.]

TESTIMONY OF CURTIS L. MACK, ESQ., MACK, WILLIAMS, HAYGOOD & MCLEAN

Mr. MACK. Good afternoon, Mr. Chairman, Ms. Congresswoman. I am Curtis Mack. I'm from Atlanta, Georgia. I'm here on behalf of the International Mass Retail Association. I have presented to the Subcommittee some written remarks which we hope to submit to the record.

Getting away from the written remarks, I would like to supplement my remarks by verbal conversation, talking about background and experience. Over the last 25 years, I have known Chairman Gould quite well. In fact, during the nomination process I supported Chairman Gould for the position he now holds. Chairman Gould and my relationship go back extensively over those 25 years.

In addition to that, I served on the Advisory Commission of the NLRB where Chairman Gould and other members appointed me as a management representative. During the last 25 years I have represented employers before the National Labor Relations Board. I have worked for the National Labor Relations Board in Cleveland, Ohio, and also served as regional director of the National Labor Relations Board in Atlanta, Georgia.

During the time I served as regional director in Atlanta, Georgia, I always believed that making decisions in bargaining units was perhaps the most important aspect of our job. If we made the right decision, we promoted and enhanced the collective bargaining process. If we made the wrong decision as regional directors, we thwarted the process of collective bargaining and made the process frustrating and difficult for employees, unions and employers.

That part of our job was awfully important. It required us to use a great deal of informed discretion, both looking at the employer's operation, looking at interrelationship of employees, integration of skills and labor relations.

To the extent we made that decision, there was some room for the union and the employer to bargain about something and there was some room to make that process work. As I read the proposed rule, notwithstanding my good friend Mr. Gould's comments, this rule wreaks havoc on the process of collective bargaining and labor relations.

It is a drastic departure and demarcation from extant board law as I have come to understand it over the last 25 years. The proposed rule that the board is now considering would essentially eliminate the need of the regional director to bring any discretion, judgment, or common sense to his or her job in trying to make decisions to promote collective bargaining.

This rule repeals and rescinds 30 years of board law and those 30 years of board law have worked quite well for the collective bargaining process. Now that we know that the proposed rule changes the law, we ask ourselves—or we should ask—is there any benefit or value to this new law if the rule takes effect?

I see no value, no benefit whatsoever. As Chairman Gould points out at page 2 of his written remark, he says he excludes certain industry from the rule because the evidence does not show sufficient uniformity to indicate that a rule would work.

I read from that very clearly, if industries and enterprises are not uniform, a mechanical rule does not promote collective bargaining; in fact, it retards the bargaining process.

In my experience as regional director, looking at cases throughout the South, I did not find that uniformity from industry to industry. In fact, I did not find uniformity from one employer's location to another. I did not find uniformity from a regional office to another regional office.

It is ludicrous to suggest to me that healthcare and others are not uniform, but fast food chain restaurants, manufacturing plants, are uniform from Alabama to South Florida or Mississippi.

Maybe Chairman Gould and the board members know something that I do not and something that I did not find. At least, I think if I had applied the mechanical or robotic approach to unit decisions in Atlanta, Georgia, collective bargaining would have been set back for 50 years.

I thought the citizens, the taxpayers and the Government wanted me to bring a measure of judgment and common sense to that process. That's what I did. I think we have promoted the bargaining.

In support of the rule, the Chairman and the proponents make reference to wasteful litigation. I did not find the wasteful litigation and representation cases as regional director. At least in those areas where wasteful litigation threatened to present itself, there are more reasonable and rational measures that a regional director—and all of them do—should take to avoid that.

If a hearing is scheduled or about to go forward when there are no genuine issues of material facts on those things that are relevant to a unit, the regional director and his staff or her staff have the power and authority to terminate that hearing and move the proceeding forward.

That's what should be done, rather than this draconian new rule process. Finally, Mr. Chairman, and Ms. Congressperson, if we enact this rule as now proposed it will have a devastating impact on inner city kids, new entrants to the job market, and persons coming into the labor movement wanting to progress and advance themselves to higher position.

For example, most employers will hire persons at one location and give them promotional opportunities at multiple facilities until the entry-level person gets to a higher level. That is possible when you have integrated workplace and you're looking at the appropriate factors.

If we take the mechanical approach suggested by the rule, there will be no opportunities for young folks to get promoted from Job A to Job B, because that will be in another union district. In sum, my experience tells me that this rule ought to be rejected and the board should continue to do that which has worked admirable for more than 35 or 40 years. Allow the regional director to use common sense and good judgment to promote, rather than retard or strangle collective bargaining.

Thank you.

Chairman TALENT. Thank you, Mr. Mack.

Our next witness is Mr. Peter Ford, assistant general counsel of the United Food and Commercial Workers Union.

Mr. Ford, I guess we have a vote coming. I'm inclined to let you go ahead and do your testimony. If you need extra time, however, after we have to leave for a vote, you certainly would be entitled to it when we came back. But let's see if we can't get it in and that way we can go right to questions when we come back.

[Mr. Mack's statement may be found in the appendix.]

TESTIMONY OF PETER J. FORD, UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO

Mr. FORD. Thank you, Mr. Chairman. Good afternoon, and Congresswoman Velázquez. For the record, I have submitted some written materials which I assume will be made part of the record. What I would like to do is briefly summarize the major points in that testimony and then, time permitting, comment on some of the comments that have already been made today.

The AFL-CIO intends to submit written comments in the notice and comment procedure. We have not done so, but will be doing so shortly. Therefore, rather than discuss the specifics of the proposed rule, I would like to talk about our view that the rule is desirable and feasible.

The National Labor Relations Act gives the board broad discretion to determine appropriate bargaining units and explicit authority to conduct rulemaking. After years of criticism from the legal community for failing to use its substantive rulemaking power, the board finally adopted a rule establishing bargaining units in the healthcare industry and that rule was unanimously upheld by the Supreme Court in the American Hospital case.

The merits of using rulemaking, which, as Judge Richard Posner has noted include, "a gain in certainty, predictability, celerity, and economy," apply with equal force to the proposed rule regarding single location bargaining units.

Through adjudication the board has ruled that such units are presumptively appropriate. The problem is that in determining whether the single location presumption has been rebutted, the board applies a vague, multifactor community of interest analysis that reportedly, to quote the Sav-On Drug case, includes all the circumstances of the case, though in practice three factors are assigned principal weight: Employee interchange, geographical proximity, and local supervisory autonomy.

This approach, we believe, encourages litigation and invites reviewing courts to second-guess the board by conducting their own weighing of these various factors. The proposed rule which relies solely on the three crucial factors would greatly simplify and clarify the single location presumption.

Unusual cases would continue to be adjudicated under the extraordinary circumstances exception. Although it would change the legal analysis of the cases, the proposed rule would not affect the outcome in the vast majority of cases in which the appropriateness of a single location unit is disputed.

Neither law nor logic requires the board to continue to determine units based on factors which, in its considered judgment, have rarely been and should not be outcome-determinative.

By clearly establishing that in a large class of cases workers will be allowed to vote on a workplace basis if they so choose, the proposed rule fosters what the Supreme Court has called the central purpose of the act, namely, to protect and facilitate employees' opportunity to organize unions, to represent them in collective bargaining.

The board is entitled to give this paramount employee interest greater weight than the interest of an employer to bargain in the most convenient possible bargaining. Another benefit of the pro-

posed rule is that it would result in considerable cost savings to the board by reducing the number and length of representation here by streamlining the board's procedures.

In view of the moving Congress to reduce the board's budget by 30 percent, the board's judgment that this proposed rule would conserve its increasingly limited and declining resources surely is legitimate. The proposed rule should significantly reduce the delays caused by protracted litigation over the issue of whether a single location unit is appropriate.

These delays are real and substantial to working people. The Manor Healthcare Case, which is summarized in my written testimony provides one telling example of the tragic consequences of that delay. The proposed rule would significantly reduce, if not completely eliminate, the chance of similar travesties from occurring in the future.

Now, a number of the witnesses have talked about how this proposed rule would overrule 30 years of board precedent. As I stated, I think that the legal analysis in many of the cases would be changed by the proposed rule. But I want to emphasize that in the vast majority of cases, the outcome would be the same if the proposed rule were applied.

Mr. Chairman, you referred to the Star Markets case. I have not read every single case, but that's one that I looked at. In that case, there was a substantial amount of temporary employee interchange, so that if the present rule was applied, that case would be decided by adjudication and presumably the same result would be reached.

The same is true in the Caribbean Restaurants case. In that case, the board's decision also talk about a substantial amount of temporary transfer and employee interchange. In fact, from my somewhat cursory review of the cases cited in former member Stevens' remarks and in some of the statements that have been presented here today, there's maybe only three or four cases, or at least that I have been able to see, where the outcome would be different under the proposed rule.

As far as whether collective bargaining would be practical under the proposed rule, I submit that collective bargaining in single location units has, for the most part, been very practical and workable under the single location presumption that has been in effect for over 30 years.

In the experience of my own union, we have a number of situations where the union represents employees at one, or just a small number of locations in a multifacility retail chain manufacturing company, a wide variety of industries. Bargaining has taken place under those circumstances. There have been a series of many, many collective bargaining agreements that have been negotiated. The processes work reasonably well.

I see my time has run out.

Chairman TALENT. I tell you what, because I think we are going to have to go to vote anyway. But I want to make sure you have enough time. So, if you think of some more in the interlude, by all means, you'll have an opportunity.

I'm just going to recess the hearing while we go and vote.

[Recess.]

Chairman TALENT. I don't think Ms. Velázquez would mind if we got into these questions in her absence, especially since we have another hearing at 2 p.m. So, I'm going to go ahead and move forward. I'm sure she'll be back presently. As far as you know that's OK.

I'm sorry, Mr. Ford. Did you have any additional comments you wanted to make?

Mr. FORD. No, thank you, Mr. Chairman. I think I have covered it.

[Mr. Ford's statement may be found in the appendix.]

Chairman TALENT. Well, I thank you very much for those comments. I have written down a series of points. Let me try and boil them down in the interests of brevity.

Mr. Coleman, let me ask you this. Mr. Ford gave us his opinion based on a pretty cursory reading of the cases that wasn't by any means necessarily true that the actual result in many of these published opinions would have been different.

I hope I made clear when I mentioned the specific cases to the Chairman before that there were indeed present in several of them substantial interchange. It is hard to tell from the record whether they would have met the 10-percent requirement in the proposal rule.

But certainly, on the basis of that, they might have come out the same way. The point I made was that the board, in its discussions, did rely heavily in those cases on the centralized management of labor relations issue and the functional integration issue.

So that, there was at least a very strong sense in my mind that many of those cases would have come out differently had the board, in effect, no longer considered those. Now, what's your view? Of the 33 cases you mentioned, the 32 or 33, where the board found that a single facility unit was inappropriate, would you care to give us any estimate? Or anyone else here?

This is kind of a lawyer's question, I guess. Mr. Mack or Mr. Coxson, do you care to estimate how many of them would have come out the other way? Do you have any sense of that?

Mr. COLEMAN. I'll be honest. I can't put a number to it, but we feel that, as you said yourself, when you look at the record of the decided cases, some of those cases you can't be absolutely certain of the factors relied upon in terms of how the proposed rule would apply.

I can cite one case to you, Globe Furniture Rentals, Inc., which was an April 1990 board decision. Very briefly, there was a union that sought to limit the voting to employees at one location, Sterling Heights, Michigan.

The employer had five locations and 75 total employees, which may mean that they would have had the necessary 15 in each of the five facilities. But the five stores were in Detroit, Troy, Southfield, Sterling Heights, Farmington Hills. The greatest distance between any of them was 25 miles. The shortest distance was 5 miles. Each store definitely had the necessary supervisor.

In that 1990 decision, which was Chairman Stevens, they found that the single facility was not appropriate. We think that under the proposed rule, that would absolutely change the outcome of that one. I wish I could tell you X number of the 33, but I can't.

Chairman TALENT. Mr. Coxson and then Mr. Mack, I would like your opinion. Mr. Ford, if you want to comment any further, you're welcome to. But particularly, Mr. Mack, did I understand you to say that in your opinion many of the decisions you made as a regional director would have come out differently under this rule than they did under the old test or the existing test?

Mr. MACK. Yes, sir, Mr. Chairman. Most of the cases that I decided as regional director, the outcome would have been different under the new test. Just looking at the things that are set forth in the new rule, there is going to be no reasonable thinking employer with 15 employees and not have a supervisor on site. That's ludicrous.

Second, when you're making these decisions as regional director, it's really irrelevant whether an operation is 1 mile nearer another or a mile and a quarter. You're really focusing on interchange relationship.

So if we were looking at these cases today under this rule, we would be looking at altogether new factors and all those cases would probably turn out different, altogether different.

Chairman TALENT. Do you have a comment?

Mr. FORD. If I could comment?

Chairman TALENT. Sure.

Mr. FORD. I agree with the remark you made, Mr. Chairman, that in many of these cases when you look at evidence of interchange it is hard to say conclusively that there was the requisite amount of interchange to take it out of the proposed rule.

But in the Globe case the board talked about there being substantial and significant amount of employee interchange in the case. They referred to there being 77 transfers. It is not clear what the size of the employee complement was or anything like that.

But the point is, if you look at these cases, I think that the proposed rule is consistent with the results in the vast majority, and really in all but a handful of cases that I have looked at.

Chairman TALENT. Mr. Ford, I can't resist asking. Don't you, in your heart of hearts, really think that this rule is going to give you a single facility unit more often when you would want it than the old one would? I mean, isn't that really where the interests of your union lies?

Maybe that's the right thing to do. Don't you really think it's going to make it easier for you to get a single facility unit?

Mr. FORD. Maybe marginally. But, you're talking—Mr. Gould, Chairman Gould remarked that in about 70 percent of the cases—

Chairman TALENT. You're already getting one.

Mr. FORD [continuing]. the presumption is found un rebutted. I don't know, you know. I don't know that there would be a significantly larger amount of cases under this proposed rule. I mean, you look at, for example, the 15-employee threshold. That takes something like a third of all the cases out of the operation of the rule.

On that basis alone, the case would be adjudicated. So, it actually—it actually might even be a smaller number. It's hard to tell.

Chairman TALENT. I'd like the basis, for the record, now or later, for that statistic, which is an interesting one. I mean, the 15 employees.

Mr. Coxson?

Mr. COXSON. Mr. Talent, I think you hit it right on the head. This rule is going to facilitate union organizing in small, fragmented units of employees. In fact, I have a starter's whistle here that I would like to present to Mr. Ford so that he can start his union's race for organizing new, dues paying members within single facility units.

Chairman TALENT. That is not really fair. He didn't have an opportunity to bring a——

Mr. COXSON. Let me just say a few words in response to your question about bank cases where there has been a single facility finding by the NLRB. First of all, there are few bank cases reported at all and that is because there has been little union organizing in the banking industry.

Yet the proposed rule is a major change in board law as applied to banks. I think that Mr. Mack's observation is correct, that it is the regional director's decision which also would be reversed or changed by the rule. Those decision are not recorded. In the banking industry, there is at least one reported case which comes to mind which would have been changed as a result of this rule. That's *Wayne Oakland Bank*. The citation to that case is in our written statement.

But I think this discussion misses the point. The fact is that when factual circumstances are carefully evaluated in each case, even if a single location unit is ultimately found, it reassures the parties that they have received due process. They have been able to rebut or at least have had the opportunity to rebut the presumption. It allows for flexibility which takes into account new circumstances, new technologies and other important considerations in deciding whether or not a single facility unit is appropriate.

Chairman TALENT. I think it's an excellent point, and the point Mr. Mack made about other ways of cutting down on litigation if that's a problem is an excellent point, as I understand judicial review in these kinds of cases.

Where you are claiming gains in administrative efficiency to support a rule, you had better be able to show that there were not other ways of achieving that efficiency that would not cut into process. By definition, I mean, the board is taking the position that it is not really changing the standard of law, which means that anything it thought was relevant before it can't stand up and say is irrelevant now, which means it can't say that that evidence is immaterial.

I mean, I just think this is going to close in on the board when it litigates these cases. It's the board's goose, I guess, that would get cooked. But, I mean, I'm really concerned about the scenario I outlined that you could get.

I mean, if I was an advocate and they acted pursuant to this rule about which there was this kind of controversy, I would make an offer of proof on these factors that they are no longer considering in every case where I possibly could. Because now I've got a flat basis for reversal down the road when the courts get a hold of this and finally overturn it.

That is another lawyer's point which you can comment on if you want. Let me make another point. I am trying to bring this to a

close as fast as I can. Another question to the—you should forgive me, attorneys here—to the real people testifying here.

It's a cheap shot, isn't it? But it's always a good line. How does this affect real people? The concern I have about not considering functional integration is this. Maybe Mr. Magnan would want to address this because I can see it most in the context to your business.

Mr. MAGNAN. Right.

Chairman TALENT. Where you've got people who are operating out of different facilities. But I was struck by your written statement that they really work more often. Often they work more with people in other facilities.

Mr. MAGNAN. Correct.

Chairman TALENT. Than they do in their own. Now, if you organize one and a union negotiates, which is what unions would do and I would do if I was negotiating for the union, classifications, people doing particular kinds of work and not—and so that you've got—let's say that's in Facility A and then you've got the person working in Facility B coming over to pick something up.

The people in the classifications that handle the shipping or the dock or something, they are busy with some other things and this person is sitting there now waiting. In other words, could you elaborate on that a little bit, about the effect of people in the unorganized workplaces on their jobs, their lifestyles, of organizing at another workplace where they have had no opportunity to express their opinion.

Mr. MAGNAN. Certainly. In our business, we have today just one job classification, which is a driver-sales representative. That person loads freight, unloads freight, does some computer work, runs what we call line haul between facilities and runs local P and D operations.

They pick their jobs based on their service rank or seniorities. When they move to work in another facility during the line haul operation, they would probably fall under the work rules of that facility. Ordinarily that would mean they would be strictly limited to driving or they would have some other type of work function.

Our operation works, for instance probably a good example, a facility in Columbia, Missouri picks up freight. They would move freight. A driver from Columbia would go to St. Louis, to what we call our freight assembly center, work on a dock in St. Louis and be under the supervision of the St. Louis manager while he was there.

He would also fuel his truck, replace a light bulb if the truck had some maintenance work to be done, and return to Columbia later in the evening. Under this type of proposal, you could have very different work rules in St. Louis than you have in Columbia.

Conversely, a driver from St. Louis would have moved to Indianapolis to work part of his shift and be under another set of work rules, potentially. So, the disruption would be traumatic across the whole board. You'd have more people, like you said, people waiting around and less opportunity to run a coherent system. So, it would be very difficult.

Chairman TALENT. Did you have a comment? Anybody else want to comment on that?

Yes, ma'am, please.

Ms. KEKUNA. As I indicated earlier, I have three units. I am very typical of the franchisees that are out there. Even though in Mr. Magnan's case you are looking at different States and employees interrelating in the workplace from this State to another State, all my units are in one State. They are within 20 miles of each other.

But my employees do have different job classifications and if one of the three units or two of the three units were organized and the other one wasn't, because it would be up to the employees' choices, I too would have the same constraints.

It could be something as fundamental to me as being able to open the store that particular day because I can't move an employee from one location to another because it's organized and the other unit isn't.

Mr. COLEMAN. The same thing is true with the chain restaurant industry. That's, I think, the big concern, is the ability to move people around. They move them around quite frequently. They move them on a permanent basis, they move them on a temporary basis.

People don't show. There are district managers that are there to be called, to say, "OK, give me somebody from here and get them over there." And if you're dealing with, perhaps, several different collective bargaining agreements in several different units and then certain units that don't have any at all, I think somebody used the term "wreak havoc," and I think that's a proper description.

Mr. COXSON. Mr. Talent, sometimes an analogy helps. Let me make an analogy to the Congressional situation. You understand labor law, but the majority of your colleagues don't and I think sometimes an analogy helps.

It would be as if, for example, your district office was a separate bargaining unit from your Washington office and you could not transfer people from your district office to your Washington office, or back and forth, because you have different unions, or one office was represented and the other was not represented.

That's the type of situation that would exist in the business community. So, maybe that makes it a little easier for Members of Congress to understand.

Chairman TALENT. Of course, Mr. Ford would say we probably don't have 15 employees in the district office.

Mr. COXSON. Well, that's true. That's true. But that's the principle involved. Also, just while I have the opportunity, I would like to associate the American Bankers' Association with Mr. Mack's comments about the rule's impact on job opportunities for young workers and minority workers.

Banks, as you know, employ quite a number of young people, minorities and women. This rule would impede their progress and their ability to be promoted and transferred from branch to branch, if some branches were represented by unions and others were not as a result of unit fragmentation.

Chairman TALENT. One more question and then I'll defer to a ranking member. Mr. Coleman, when I look at yours—that graph there, and it says to me—because Chairman Gould talked about a lack of clarity in this field of law. It would seem to me that the less clarity there is in a field of law, the more published decisions you are likely to have.

Obviously, not necessarily. But every piece of evidence that we have got so far suggests the opposite of what the board is saying. That doesn't mean it can't, with regard to efficiency and litigation—but it doesn't mean it can't be true. It just means that, not only is there no evidence to support it objective, but that the evidence we have got suggests to the contrary.

I mean, what that graph tells me is that when this rule was announced in the mid1960's under the McCullough Board, it took some time for the board to refine it so that people knew what it meant. Then over a period of time, the cases under it kept going down and down. Now people pretty much understand what it is.

Is that your interpretation?

Mr. COLEMAN. I couldn't agree with you more. I could not. I mean, there could be other reasons, but I think that it's certainly safe to assume that as you look at that trend and the step down, especially way down once you get to the mid1980's and come forward, that less people are litigating it.

I think that has to mean to some degree there is less ambiguity about the issue.

Chairman TALENT. A powerful piece of evidence in the Court of Appeals, is what I'm thinking.

Mr. COLEMAN. Yes. It is—

Chairman TALENT. See, the lawyers win, no matter what, don't they?

Mr. COLEMAN. One way or another. In our opinion it is the best available evidence. I know the Chairman said earlier this morning that—he referred to all kinds of unpublished decisions, but then I think he frankly admitted that they really couldn't quite get their hands on that information.

Well, this is concrete, it's objective, and we know it's out there. It clearly shows a dramatic decline in the number of these decisions.

Chairman TALENT. Does the gentle lady from New York have questions?

Ms. VELÁZQUEZ. Yes, Mr. Chairman, thank you. I just would like to bring some balance into this discussion and that's why I just—I would like to start with Mr. Ford. Seven people here are witnesses against one.

Mr. Ford, I assume that you and the attorneys at the USCW have seen more than you have shared of litigation on single location units. Tell me, how do you foresee this rule affecting the outcome of this type of case?

Mr. FORD. Ms. Velázquez, we see this proposed rule if adopted as greatly reducing the amount of this kind of litigation. As Chairman Gould alluded in his remarks, most likely there would be a challenge made to this rule if it was adopted as there was to the healthcare industry rule.

A court, possibly the Supreme Court, would conclusively resolve the issue. We agree with Chairman Gould that most likely the rule would be upheld. At that point I think you would see a dramatic decrease in litigation over unit scope issues. There could be other issues that would still be litigated, but this would not be one, in most cases.

Ms. VELÁZQUEZ. Would you say that integrity or impartiality of the process will be jeopardized by this rule in any way?

Mr. FORD. I don't see it, I really don't. I think that actually integrity and fairness in the process is increased by having a rule-making proceeding where all interested parties can weigh in and state whether and why they favor or oppose the rule. That's exactly what is going on in the notice and comment proceedings.

Ms. VELÁZQUEZ. So, if the outcome of the large majority of these cases would be the same under the proposed rule as under adjudication, why do you think this proposal has generated so much opposition?

Mr. FORD. Well, I think—and again, Chairman Gould as well as Chairman Talent had alluded to it. In some instances, employers may think that delaying the ultimate resolution of these cases worked to their tactical advantage.

Generally, delay works against the workers' interests when, as these cases are being litigated the workers are left at the workplaces frustrated. Their employers are often continuing to harp on them that they are opposed to unionization.

Many employees end up leaving the workplace and it's—that's a real practical problem for working people who are trying to better themselves, to have that type of a situation. They just don't understand why it has to be that way.

Ms. VELÁZQUEZ. Do you know of any situation where a union represents workers at only one or a few locations of an employer's multilocation enterprise who has had a collective bargaining relationship with the employer of those locations?

Mr. FORD. Yes.

Ms. VELÁZQUEZ. Can you provide some examples?

Mr. FORD. Yes, my own union. These are just situations I know of from experience. Our local union in Pittsburgh represents two grocery stores of a centralized chain that operates throughout Pennsylvania. They have represented those two stores for over 30 years.

The rest of the company is unorganized. The company has centralized labor relations policies, and for the most part benefits are the same at the unionized stores. There haven't been any real problems.

Out in the San Francisco area I am aware of a number of instances in the retail department store industry, in the retail jewelry industry, where our union represents one or two stores in an approximately 30-store chain.

I think in the retail jewelry example, the union represents maybe 4 or 5 out of 15. But there are a number of instances like that. In the manufacturing industry we have it, and it has never presented a problem for productive collective bargaining relations, as far as we can see.

Ms. VELÁZQUEZ. Mr. Mack, I would like to ask you, what in the rule prevents employees in businesses from being promoted or transferred?

Mr. MACK. Yes, ma'am, thank you. What is there in the rule that permit—prohibit employees from being transferred? That's the question. There is nothing in the rule itself that prohibits the transfer.

What the rule does is, by operation or consequences of collective bargaining, impede transfers. In my experience, both as director and a lawyer, each unit and each union has a collective bargaining agreement. All promotion job transfers are dealt with in that unit, the single store.

Another union a mile and a quarter away, if you apply this rule, would have a different bargaining unit either by the same union or a different union. Union 1 wants its members to get promoted in Unit 2 and Union 2 wants its members to get promoted.

Having those two separate agreements would prevent inter-plant or inter-facility transfer. Assuming you've got, for the moment, a person employed at a Level 1 job classification at Unit 1. He or she is doing something very similar to a Level 2 job at Unit 2. He or she has the background and experience to move over to this new job that pays more money.

But because this union over here is only concerned about its members and its jurisdiction, it would fight to the death to prevent that employee from coming over. Now, what does that do to the young folks and the newcomers in inner cities, if you're in downtown Atlanta or downtown New York?

You're usually trying to advance from the inner city to the suburb where the higher jobs are, where the activities are growing. When the promotional opportunity comes out, it is usually posted in the one facility, and you, in facility two, never hears about.

If the employer promotes you over there, you are going to get a fight or conflict between the two unions and their employers. I think that would wreak havoc on young folks.

Ms. VELÁZQUEZ. Mr. Ford, would you please comment on that?

Mr. FORD. Well, again, our experience tends to suggest that that's not really a problem. One example in the manufacturing industry, we have a situation where our union represents employees at two or three—I believe it's three of an employer's plants. Another union represents the employees at certain other plants.

Yet further still, the majority of the plants are nonunion. Again, I just have not—from our experience have not seen this to be a major problem.

Ms. VELÁZQUEZ. Thank you.

Mr. Coleman, I was wondering if you could clarify the point for me. In your statement you seem to say that worker rights on issues like this are better dealt with at the headquarters of the franchise.

Mr. COLEMAN. I want to make sure I understand the question. That worker rights are better dealt with at the——

Ms. VELÁZQUEZ. Franchise. At the location. Are better dealt with at the headquarters of the franchise.

Mr. COLEMAN. Can you just refer me——

Chairman TALENT. I think she is referring to centralized labor relations. Is that what the lady thought?

Ms. VELÁZQUEZ. That's right.

Mr. COLEMAN. I'm sorry, I missed the point. I can certainly speak for the chain restaurant industry, that is the labor policies are very much uniform within a chain. Or if you are a franchisee that may have, let's say, 15 or 20 or even 100 different restaurants under franchise agreement, they are going to very much set uniform labor relations policies, wage rates, personnel manuals.

I mean, uniformity is the fundamental underpinning of the chain restaurant industry, because they want you to be able to visit a restaurant in New York and a restaurant of the same trade name in Los Angeles and not find any difference.

Ms. VELÁZQUEZ. I have before me an article that appeared November 14th of the Wall Street Journal and in this article, advocates of franchise businesses like yours, claim that each franchise unit should be allowed to administer laws like the Americans With Disabilities Act at the franchise level.

Mr. COLEMAN. I think you think there is a conflict there. As between a franchisor and a franchisee.

Ms. VELÁZQUEZ. Don't you think that it's like Congress is supposed to let franchises pick and choose when it's convenient for them?

Mr. COLEMAN. Well, let me try to clarify what I'm saying to you. The franchisor is not trying to direct the business of the franchisee beyond very limited aspects of the franchise relationship, such as use of the trademark and certain products.

A franchisor under most franchise agreements is not going to try to get into the business of dictating labor policies or wage rates to a franchisee. You've got to remember they are two separate, independent businesses, connected only via the franchise agreement.

So when we're talking about chains, if you're talking about company-owned-and-operated restaurants that are run by a franchisor, that is what I am talking about as being run on a uniform basis.

You are stepping to a different owner and operator when you're talking about a group of franchised restaurants that are being run by one particular owner-operator, but the franchisor is not dictating the centralized labor policies to the franchisee.

Chairman TALENT. I'm going to let the gentle lady have the last word if she would like. We have got to get out of here or the staff on a bipartisan basis of the Subcommittee is going to shoot us.

Ms. VELÁZQUEZ. You could see it by the makeup of the panel, Mr. Chairman. I don't have any other questions.

Chairman TALENT. All right. I thank everybody and I'm going to adjourn the hearing. The record is going to stay open and I'm going to ask everybody if they have any conversations about the hearing to please take them outside because there is another group of people going to come stampeding in here.

[Whereupon, at 1:55 p.m., the Subcommittee was adjourned, subject to the call of the chair.]

APPENDIX



The National Council of Chain Restaurants

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TESTIMONY ON BEHALF OF THE
NATIONAL COUNCIL OF CHAIN RESTAURANTS

BEFORE THE

SUBCOMMITTEE ON REGULATION AND PAPERWORK
COMMITTEE ON SMALL BUSINESS

U.S. HOUSE OF REPRESENTATIVES

CONCERNING

THE NATIONAL LABOR RELATIONS BOARD'S
NOTICE OF PROPOSED RULEMAKING ENTITLED

"APPROPRIATENESS OF REQUESTED SINGLE
LOCATION BARGAINING UNITS IN
REPRESENTATION CASES"

PRESENTED BY:

JAMES M. COLEMAN, ESQ.
GENERAL COUNSEL
NATIONAL COUNCIL OF CHAIN RESTAURANTS

MARCH 7, 1996

TESTIMONY OF JAMES M. COLEMAN, GENERAL COUNSEL
NATIONAL COUNCIL OF CHAIN RESTAURANTS
BEFORE THE SUBCOMMITTEE ON REGULATION AND PAPERWORK
COMMITTEE ON SMALL BUSINESS
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON, D.C.
MARCH 7, 1996

Good morning, Mr. Chairman, and Members of the Subcommittee on Paperwork and Regulation, Committee on Small Business. My name is James M. Coleman. I am a partner in the firm of Power & Coleman, which has its principal office in Arlington, Virginia. I also serve as the General Counsel for the National Council of Chain Restaurants, a Washington, D.C.-based trade industry group which represents forty of the nation's multi-unit and multi-state restaurant companies. Collectively, these forty companies own and operate over 30,000 restaurant establishments. Additionally, through franchise and licensing agreements, another 50,000 establishments are operated under their trademarks, in many cases by individuals who act in the capacity of owner/operator. It is in my capacity as General Counsel of the National Council of Chain Restaurants (hereinafter "NCCR" or "Council") that I am appearing before this subcommittee to testify concerning the National Labor Relations Board's (hereinafter "Board" or "NLRB") proposed rulemaking concerning the Appropriateness of Requested Single Location Bargaining Units in Representation cases.

In requesting comments concerning the proposed rule on single location bargaining units, the Board proposes to adopt a presumption that the single location unit is appropriate absent extraordinary circumstances. As far as the extraordinary circumstances exception is

concerned, the Board has clearly expressed its intention to construe the extraordinary circumstances exception very narrowly.

It is the Council's position that the adoption of a rule that sets forth a virtually irrebuttable presumption that a single location unit is appropriate, absent extraordinary circumstances, is unwise and would be counter-productive because of the adverse impact such a rule would have on the growth and expansion of restaurants and other small retail businesses. As I shall discuss in much greater detail shortly, we believe the proposed rule should be rejected by the Board.

The Council contends that the Board should not adopt the proposed rule because the rule is not based on the actual experience of the agency, nor is it supported by a reasoned analysis and is, therefore, arbitrary and capricious. The United States Supreme Court has stated that an agency's rulemaking must not be arbitrary or capricious, but must be a rationally and legally permissible agency policy that reflects an appropriate weighing of the relevant interests and is supported by reasoned analysis. *American Hospital Assn. v. NLRB*, 499 U.S. 606, 619 (1991) (citing *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29 (1983)).

It is the Council's position that the proposed rule on single location bargaining units is arbitrary and capricious and, therefore, flawed for three significant reasons. These reasons are:

- (1) The proposed rule is not based on agency expertise or experience as it eliminates decades of case-by-case analysis of factually particularized situations;

(2) The rule is overbroad because it ignores the practical realities of the chain restaurant industry, among others; and

(3) The Board's stated rationale for the proposed rule is not supportable by record evidence because significant decisions by the Board and the courts involving the chain restaurant and retail industries have found a multi-facility unit appropriate and there is no empirical evidence to support the Board's allegation that extensive litigation and delay are associated with cases involving multi-facility units.

1. **THE RULE PROPOSED BY THE BOARD IS NOT BASED ON AGENCY EXPERTISE OR EXPERIENCE BECAUSE IT ELIMINATES DECADES OF CASE-BY-CASE ANALYSES OF FACTUALLY PARTICULARIZED SITUATIONS.**

The Board has, in effect, eviscerated the multi-factor test it has applied for well over thirty years to fashion its proposed rule based on three very limited criteria. These criteria are: (1) that fifteen or more employees in the requested unit are employed at that location; (2) that no other location of the employer is located within one mile of the requested location; and (3) that a statutory supervisor is present at the requested location for some period of time.

With one broad stroke, the Board will eliminate thirty-plus years of well-established precedent by determining that the currently recognized factors of functional integration, centralized management control, common skills, permanent transfers, and bargaining history will in the future be considered "non-material." The Board in proposing the new rule, does not support its decisions to eliminate these additional factors with specific caselaw, but rather simply engages in second-guessing of past Board decisions.

Referring to functional integration, the Board, in its Notice of Proposed Rulemaking, states that, "There have been Board decisions which have purported to rely, in part, on specific evidence of 'plant integration.'" The Board also stated that, "While a few Board

decisions conclude that the single facility presumption has been rebutted because the single plant is 'highly integrated' with other facilities, this conclusion is generally based on more specific factors we now propose." The Board, however, does not cite examples of such cases.

The Board's elimination of functional integration as a factor in determining the appropriate unit has no basis in the reported decisions of the Agency or Courts of Appeals. It is apparent from the Board's stated reasons for overruling its case precedent that it has relied more on speculation and second-guessing as the unarticulated premises that prior Boards used to arrive at various decisions concerning multi-facility units rather than on experience or empirical evidence. This is certainly a novel form of interpretation of NLRB caselaw.

As the history of the Board's and federal courts' decisions demonstrates, these discarded factors are of vital importance in determining the appropriateness of the unit. In particular, the Board proposes to eliminate consideration of what the Seventh Circuit, following the approach of other appellate decisions, referred to as "centralization of management," particularly in regard to central control of personnel and labor relations. *See, NLRB v. Chicago Health & Tennis Clubs, Inc.*, 567 F.2d 331, 335 (7th Cir. 1977).

Most chain restaurants have centralized wage and benefit structures, hiring policies, training and other personnel matters. In addition, a very high percentage of chain restaurants and retail stores have centralized their advertising, bank accounts, budgets, hours of operations, timekeeping, promotions, transfers, policies including personnel manuals, benefits, work rules and regulations. The Board, while reluctantly acknowledging that prior Board decisions have considered the authority exercised by local supervisors as compared to managers who are centrally located, nevertheless the Board dismisses the legal importance of

this factor by simply characterizing this type of analysis as being "wasteful" and "unnecessary."

The Board's disregard of this factor is sharply at odds with many court decisions that require the Board to give weight to the employer's centralized operations. See, *Szabo Food Services v. NLRB*, 550 F.2d 705, 709 (2d Cir. 1976); *NLRB v. Solis Theatre Corp.*, 403 F.2d 381, 382 (2d Cir. 1968).

The Board's proposed rule simply fails to deal with the underlying reality of most businesses which, it reluctantly acknowledges, require centralized control and functional integration of retail operations. In its Notice of Proposed Rulemaking, the Board stated: "Few businesses today with more than one location fail to maintain centralized control over the conduct of operations... it is a matter of good business practice..." In view of the Board's recognition that more businesses exercise common control over employment and labor practices at geographically disbursed locations, it is arbitrary and capricious for the Board to state that centralized control is a "non-material" factor in its analysis regarding the appropriateness of the single location bargaining unit.

It is this very factor -- centralized control over labor relations -- that has been determinative in prior Board decisions holding that one single restaurant is not an appropriate bargaining unit. See, e.g., *White Castle Systems, Inc.*, 264 NLRB 267 (1982); *Caribbean Restaurants, Inc.*, 162 NLRB 676, 679-80 (1967); *Twenty-First Century Restaurant*, 192 NLRB 881, 882 (1971).

In addition to the Board eliminating a factor that is well-supported by legal precedent, the Board proposes to add a "bright-line" one mile rule regarding geographical proximity

between facilities that is not supported by the Board's history nor experience. *See, Globe Furniture Rentals, Inc.*, 298 NLRB 288 (1990); *Queen City Distributing Co.*, 272 NLRB 621 (1984); *Nakash, Inc.*, 271 NLRB 1408 (1984); *Kobacker Stores, Inc. d/b/a Pic-Way Shoe Mart*, 274 NLRB 902; *Kirlin's, Inc.*, 227 NLRB 1220 (1977).

If the period from 1980 through 1994 of the Board's history is a measure of the future, ignoring these additional factors demonstrates that in approximately half of the cases the Board will find a single facility unit appropriate, where under its prior test, on the same or similar factual record, the single facility unit would have been held to be inappropriate. The Board has not presented any substantive reasons why this total reversal of prior Board precedent is desired or appropriate.

2. THESE PROPOSED RULE IS OVERBROAD INASMUCH AS IT IGNORES THE PRACTICAL REALITIES OF THE CHAIN RESTAURANT INDUSTRY, AMONG OTHERS.

The history of the chain restaurant and retail industry makes clear that the presumption of a single facility location has been rebutted numerous times given the centralization of management in this industry. *See, e.g., White Castle System, Inc., supra; Waiakamilo Corp.*, 192 NLRB 878 (1971); *Twenty-First Century Restaurant, supra; Petrie Stores Corp.*, 266 NLRB 75 (1983); *Ohio Valley Supermarkets, Inc.*, 269 NLRB 353 (1984); *Nakash, Inc., supra*. Yet, the Board inexplicably seeks to group the chain restaurant and retail industry with every other industry except for public utilities, construction, and ocean-going vessels.

The Board's previous rulemaking endeavor to establish appropriate units in a particular industry was limited to acute care hospitals, which it stated "do not differ in substantial,

significant ways relating to the appropriateness of units." *See, American Hospital Assn. v. NLRB*, 499 U.S. 606 (1991). In contrast to acute care hospital rulemaking, here the Board has proposed a rule which will virtually cover the water-front applying to every industry in the United States except public utilities, the construction and maritime industries. The Board's proposed rule is even broader than the rule it announced in its Advance Notice of Proposed Rulemaking ("ANPR"), in which the Board considered promulgating a rule for the retail, trucking, and manufacturing industries.

In proposing the instant rule, the Board fails to take into account the fact that the chain restaurant industry is different from other industries in the operational requirements for uniformity of policies and procedures. The uniformity is demonstrated by many chain restaurants having identical exterior and interior designs, offering the same limited number of food and beverage items at a uniform price, having identical hours of operation, requiring employees to wear the same or similar uniform during working hours, and maintaining the same labor and employee relations policies and rates of pay.¹ The Board has found it significant that chain restaurants conduct business under standardized policies and procedures subject to close centralized control.² Prior Board decisions also clearly demonstrate that chain restaurants tend to be highly integrated enterprises. This trend will no doubt continue given the wide-spread advances of new workplace technology such as computer networking,

¹ *See, e.g., Caribbean Restaurants, Inc., supra; White Castle System, Inc., supra; Twenty-First Century Restaurant, supra; and Waiakamilo Corp., supra.*

² *Id.*

electronic and voice-mail, facsimile transmission, and teleconferencing, all of which can interconnect distant facilities.³

As the above-cited Board decisions make clear, the proposed rule is overbroad insofar as it includes the chain restaurant business with other unrelated industries. The Board's "one-rule-fits-all" approach is not only unwise, but also unrealistic, which surely will lead to increased, rather than less, litigation.

3. **THE BOARD'S STATED RATIONALE FOR PROPOSING THE RULE IS NOT SUPPORTED BY PAST EXPERIENCE NOR EMPIRICAL EVIDENCE.**

Two of the Board's stated reasons for proposing the rule are: (1) the historical likelihood that in most cases a single facility unit will be found appropriate; and (2) the extensive litigation currently involved and the delays caused by such litigation. A review of past Board decisions and other data compiled by the Agency reveals that the Board's reasons for the rule are not supported by past experience nor by any empirical evidence.

(a) **SIGNIFICANT DECISIONS IN THE RESTAURANT AND RETAIL INDUSTRIES HAVE FOUND A MULTI-FACILITY UNIT APPROPRIATE.**

A thorough review of the Board's cases reveals many decisions where the Board found the multi-facility unit was the only appropriate unit in the chain restaurant and retail industry.⁴

³ Cf. *Neodata Product Distribution*, 312 NLRB 987 (1993) (In finding two facilities were integrated as part of an order-flow process, the Board noted that both facilities were linked by central computer.)

⁴ See, *White Castle System, Inc.*, *supra*; *Caribbean Restaurants, Inc.*, *supra*; *Waiakamilo Corp.*, *supra*; *Twenty-First Century Restaurant*, *supra*; *L.T.T. Continental Baking Co., Inc.*, 231 NLRB 326 (1977); *The Lawson Milk Co. Div.*, 213 NLRB 360 (1974).

During the period 1980 through 1994, there were 61 reported Board decisions regarding the appropriateness of a single facility bargaining unit. In 33 of those cases, the Board held that the single facility was not an appropriate bargaining unit. In only 28 cases did the Board find that the single facility was the appropriate bargaining unit.

Given the fact that the Board determined that the single location unit was not appropriate in the majority of decisions published by the Board during the period 1980 through 1994, the Agency should not promulgate the proposed rule which would create an irrebuttable presumption that the single facility unit is appropriate.

(b) THERE IS NO EMPIRICAL EVIDENCE TO SUPPORT THE BOARD'S PREMISE OF EXTENSIVE LITIGATION AND DELAY.

The Board has not supported the proposed rule with any empirical evidence of extensive litigation or delay. Instead, the Board merely states that there is extensive litigation and delay. Additionally, a review of the reported decisions by the Board during the period 1960 through 1994 reveals that the litigation regarding the appropriateness of a single location unit has been on the decline. As the attached graph shows, the largest number of published Board decisions regarding the appropriateness of single versus multi-facility bargaining unit cases was issued during the five year period from 1965 through 1969. During this period, the Board published 71 decisions. After this period, the number of published decisions concerning single versus multi-facility bargaining units have declined dramatically, with only 11 cases having been published during the five year periods from 1985 through 1990 and 1990 through 1994. In fact, during 1995, there were no published Board decisions concerning single versus

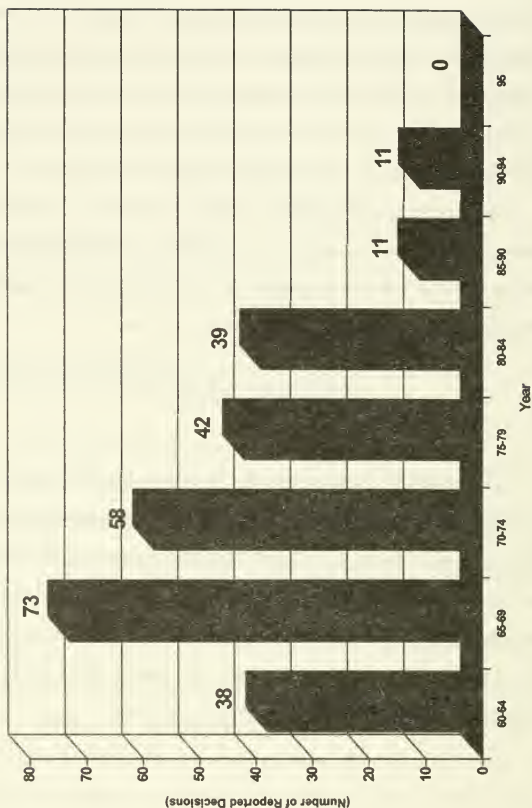
multi-facility bargaining unit cases. Moreover, from 1980 through 1994, the Board published 62 decisions regarding the appropriateness of a single versus multi-facility bargaining unit. This averages out to approximately 4 (four) decisions a year. Obviously, the Board's premise regarding "extensive litigation currently involved" is not only not supported by published Board decisions, but, in fact, it is contradicted by the Board's own records.

At a minimum, the Board should conduct public hearings once the Board has a full complement of five Members to gather empirical evidence which will provide an objective basis for arriving at a conclusion concerning the extent of litigation and the amount of delay which has resulted from the application of the multi-factor test.

CONCLUSION

In conclusion, the Council submits that the Board's proposed rule on the appropriateness of requested single location bargaining units in representation cases will not achieve the goals announced by the Board. The multi-factor test currently relied upon by the Board has worked for well over thirty (30) years. It is the Council's position that there is no valid reason to change Board caselaw and procedure at this particular time. Accordingly, the Council respectfully urges the Board to refrain from engaging in rulemaking as contemplated by the Board's proposed rule on single location bargaining units.

Published Decisions Regarding Appropriateness of Single v. Multi-Facility Bargaining Units



TESTIMONY
OF
HAROLD P. COXSON
ON BEHALF
OF THE AMERICAN BANKERS ASSOCIATION
ON
THE NATIONAL LABOR RELATIONS BOARD'S PROPOSED RULE ON
SINGLE LOCATION BARGAINING UNITS
BEFORE THE
COMMITTEE ON SMALL BUSINESS
SUBCOMMITTEE ON REGULATION AND PAPERWORK
MARCH 7, 1996

ABA 03-05-96

Mr. Chairman and Members of the Subcommittee:

On behalf of the American Bankers Association ("ABA"), I want to thank you for this opportunity to testify before you on the National Labor Relations Board's Proposed Rule on the Appropriateness of Requested Single Location Bargaining Units in Representation Cases. My name is Harold P. Coxson and I am a principal in the law firm of Coleman, Coxson, Penello, Fogleman & Cowen, P.C. which specializes in the representation of management in labor and employment law matters. I serve as one of twenty-five lawyers on the NLRB's Management Advisory Panel selected by the Chairman and Members of the National Labor Relations Board ("NLRB").

The American Bankers Association is the only national trade and professional association serving the entire banking community, from small community banks to large bank holding companies. ABA members represent approximately 90 percent of the commercial banking industry's total assets. Approximately 94 percent of the ABA's over 9,000 members are community banks with assets of less than \$500 million.

In order to put in context the American Bankers Association's concerns with the NLRB's Proposed Rule on Single Location Bargaining Units it may be helpful to describe the current climate in the banking industry.

I. Today's Bank

Banking is, perhaps, the most regulated industry in the United States. Attached to this testimony is a list of commercial bank regulations compiled as of March 1993, that every day a banker must comply with. The regulations listed are only those specific to the banking industry and do not include regulations imposed on all businesses, such as OSHA. As a result of such extensive regulation, bank operations are by necessity highly centralized and fully integrated. Regulations aimed at, for example, preserving the safety and soundness of a bank apply without regard to whether the activity takes place in a branch or at head office or, indeed, whether a bank even operates branches. Lending limits (12 U.S.C. 84) real estate standards (12 U.S.C. 1828) to name just two make centralized control a necessity. Check clearings are governed by the Federal Reserve's Regulation J. Regulatory monitoring through comprehensive quarterly reporting requires a high degree of standardization of all the activities. The consumer protection provisions such as Truth In Lending (Regulation Z), Consumer Leasing (Regulation M), Funds Availability (Regulation CC), to cite a few examples, mandate uniform procedures in all branches and head offices and detailed compliance and auditory oversight.

Another phenomenon of the banking industry is the rapid expansion of the number of bank branches to service customers closer to where they live, work, shop and vacation. The time has long since passed when small towns each had only a single community bank located downtown. Today, there are 10,000 commercial banks in the United States, of which more than 4,200 operate two or more branches. A typical small \$50 million bank

has two branches, larger institutions operate hundreds of branches. The number of bank branches has steadily increased and is continuing to increase (see Table 1). For example, in 1995 there has been a 25 percent increase in bank supermarket branches, with 3,142 such branches. National Commerce Bank Service Inc. predicts that supermarket branches will increase to 7,000 by the year 2000.

Bank branches of all types are linked closely together by technologies which bring far-flung operations closer together and make geographic separation less of a factor in unit determination. Banks are in the forefront of significant technological advances in the workplace, including computer networking, electronic mail and facsimile transmission - to name a few of the more common methods of workplace telecommunications. In fact, today's banks are struggling to keep up with technological developments and the impact of such developments on the payment system, all the while making banking services more and more accessible to customers. The proliferation of automated teller machines, through which a customer can access his account at a bank across the country, telephone banking, home banking through computer, debit cards, all add to the customer's convenience. Yet, in spite of these developments, banks continue to add new branches -- a nearly 50 percent increase in the last 20 years.

On the horizon is electronic cash, and stored value cards or "smart cards." A firm, which may or may not be a bank, provides a medium for payment, and the mechanics for redemption of payments. These developments could potentially have a profound impact on banking. Banks will need to respond if they are to remain competitive.

Spiraling technology costs certainly contributed to the recent merger activity in banking. Automated bank services and the consolidation of back-office systems and personnel achieve economies of scale. Centralization of a bank's increasingly complex and costly system which provide technological support throughout the institution's operations is today essential for the "typical bank."

II. The Significance of NLRB Unit Determinations.

The determination of whether a unit, or grouping, of employees is appropriate for purposes of organizing and collective bargaining is, perhaps, the most basic and important function of the National Labor Relations Board. The Board's jurisdiction to make unit determinations "is at the heart of our system of collective bargaining, and has a most pervasive impact upon industrial relations." Gorman, Basic Text of Labor Law, West Publishing, 1976, p. 67. Unit determination provides the initial context in which employees may exercise their right to freedom of choice, as well as the basic framework within which collective bargaining will either succeed or fail. For, as the NLRB stated over thirty years ago, "if the [NLRB's] unit determination fails to relate to the factual

situation with which the parties must deal, efficient and stable collective bargaining is undermined rather than fostered."¹

Unit determination is important for another very practical reason. As noted by a basic text on labor law:

The size and composition of the bargaining unit is often a subject of dispute between union and employer and between contending unions, since this decision can determine whether the union is entitled to representative status. A union which may enjoy majority support within a small unit may not be able to establish its majority in a larger unit. Similarly, the size and composition of the bargaining unit determine which of two contending unions gains representation status.²

Congress has delegated to the National Labor Relations Board wide latitude to determine "appropriate" bargaining units on a case-by-case basis. Section 9(b) of the National Labor Relations Act provides that the Board "shall decide in each case ...the unit appropriate for the purposes of collective bargaining, ..." 29 U.S.C. § 159(b). The Act also provides certain basic restrictions on the Board's unit determinations, the most basic of which is that unions cannot dictate bargaining units based solely on their ability to organize, i.e., "extent of organization." 29 U.S.C. § 159(c)(5). By analogy to congressional elections, candidates should not be permitted to select only those parts of an established congressional district which may be more favorable to the candidate nor to redefine the district's boundaries in each election. Congressional districts, like appropriate bargaining units, should be drawn on the basis of a variety of factors, the most fundamental of which is a "community of interest."

There is no single factor which is determinative of whether a single facility is an appropriate unit, or grouping, of employees for purposes of union representation and collective bargaining.

As the Supreme Court emphasized over fifty years ago:

Wide variations in the forms of employee self-organization and the complexities of modern industrial organization make difficult the use of inflexible rules as the test of an appropriate unit. Congress was informed of the need for flexibility in

^{1/} Kalamazoo Paper Box Corp., 136 NLRB 134, 138 (1962)

^{2/} Hardin, The Developing Labor Law, (3ed., 1992), p.448.

shaping the unit to the particular case and accordingly gave the Board wide discretion in the matter.³

Given the federal court's broad deference to the NLRB's specialized expertise and careful, case-by-case analysis, courts rarely disturb the agency's selection of an appropriate bargaining unit unless it is arbitrary and amounts to an abuse of discretion. South Prairie Construction Co. v. Local 627, Int'l Brotherhood of Operating Engineers, 425 U.S. 800,805 (1976). Throughout its sixty year history, the Board has earned this respect by its scrupulous analysis of a series of critical factors in unit determination. Even though the Board has established certain presumptions in favor of single facility bargaining units, including such a presumption in the banking industry,⁴ it has been careful to consider specific factors in a case-by-case analysis which may rebut such presumptions.

For example, in Hawaii National Bank, the lead case on unit determinations in the banking industry, a special concurring opinion by then-NLRB Chairman Miller stated:

Because of the highly integrated functional operation of banks generally . . . we ought to closely scrutinize the facts in each individual case arising in the banking industry, applying no preconceived notions or presumptions, and with particular attention to the following factors:

(1) the extent of the centralized control of the commercial and administrative aspects of the business, (2) the extent of centralized or decentralized control of labor policy (including not only where the overall level of wage and fringe benefits is determined but also where other working conditions of real importance to employees are determined, such as decisions on hiring, individual increases, promotions, discipline, and the like), (3) the extent of employee interchange among the branches, (4) the amount of personal contact between employees of the branches (or, to state the converse, whether personal contact is limited strictly to the employees of the particular branch), and (5) the extent of geographic separation of the particular branch petitioned for from other branch banks in the operation.

Our failure to give careful attention to each of these factors has, on occasion, been criticized by the courts, even to the extent of our having been found guilty of an abuse of

³/ NLRB v. Hearst Publications, 322 U.S. 111, 134 (1944) (emphasis added).

⁴Hawaii National Bank, 212 NLRB 576 (1974).

discretion in making appropriate bargaining unit determinations in this industry. The Wayne Oakland Bank v. NLRB, 462 F.2d 666 (C.A. 6, 1972).

212 NLRB at 576-577.

Since Hawaii National Bank, the Board has applied the single facility presumption to banks with mixed success in the courts. See Wyandotte Savings Bank v. NLRB, 669 F.2d 386 (6th Cir. 1982), denying enforcement to 250 NLRB 362 (1980); Alaska State Bank v. NLRB, 653 F.2d 1285 (9th Cir. 1981); Wayne Oakland Bank v. NLRB, 462 F.2d 666 (6th Cir. 1972).

In Wayne Oakland Bank, for example, the Sixth Circuit held that the NLRB abused its discretion in designating a single branch bank as an appropriate bargaining unit. The court found determinative such factors as: (1) centralization of banking operations; (2) whether bank services were centrally administered; (3) centralized control and uniformity of wages, hours and benefits; (4) employee interchange between branches; (5) presence of an independent supervisor; and (6) geographic proximity of branches and central operations.

It is through such individualized analysis that, while the parties and the courts may disagree from time-to-time with the Board's determinations, the agency has earned a well-deserved reputation in the representation case area.

That is one reason why the NLRB's proposed rule is so disappointing. It substitutes a mechanical, mathematical rule for carefully reasoned analysis on a case-by-case basis. Yet it is basic textbook labor law that unit determinations and questions of community interest are "not susceptible to precise definition or to mechanical application . . . [T]he ultimate determination much more often depends on detailed factual analysis on a case-by-case basis than on the application of rules of law."⁵

Now, after nearly sixty years of judicial deference to the Board's asserted specialized substantive expertise, the current Board announces that, even in light of complex new workplace operations, organizational structures and rapid technological developments not dreamed of by employers in the past, the agency now merely needs to apply an inflexible mechanical rule for unit determinations in nearly every case. In a recent speech, in fact, Chairman Gould denigrates this once important and proud function of the agency, and the job duties of countless professional staff, to a simple administrative task by announcing that, in his view, the proposed rule only requires "a calculator and odometer" to administer. NLRB Press Release R-2028 at p. 6 (December 9, 1994).

⁵The Developing Labor Law, p. 452.

III. Importance of the NLRB's Proposed Rule on Single Location Bargaining Units as Applied to the Banking Industry

The ABA is concerned that the NLRB's Proposed Rule on Single Location Bargaining Units, as applied to the banking industry, will result in an irrebuttable presumption that appropriate units of employers for purposes of union organizing and collective bargaining will be small, single branch locations, or other fragmented units, solely dictated by union "gerrymandering" in representation petitions, without regard to the context and real-life factual circumstances in which collective bargaining is to take place in the banking industry.

The proposed rule totally eliminates from consideration by the Board and the federal courts the most critical factors which have been carefully evaluated in unit determinations in the banking industry. The factors now discarded as "non-material" are those which are most relevant for banking and which, if given their deserved weight in the reality of today's banking operations, would tend to rebut the single location "presumption" in banking units. The factors eliminated from any possible consideration and no longer given any weight in unit determinations are: functional integration; centralization of administration; similarity of skills, functions and working conditions; and bargaining history. Since, as we described earlier, the typical bank today is a functionally integrated, highly centralized operation in which there is a great degree of similarity in skills, functions and working conditions among bank branches, and very little bargaining history, the total elimination of these factors prevents a realistic assessment of appropriate bargaining units in the banking industry.

Conversely, the only factors the NLRB will now consider in unit determinations under the proposed rule are skewed in favor of single location units and ignore the realities of the banking industry. The only factors deemed "material" under the proposed rule are: minimum unit size (arbitrarily set at 15 or more unit employees), geographic proximity (arbitrarily set at a one-mile radius of the proposed unit), and the local presence of a supervisor (which the rule expansively denominates "local autonomy"). As discussed earlier, the dramatic increase over the past twenty years in the number of bank branches (from 44,589 in 1975 to 66,722 in 1995), together with the equally dramatic technological advances in banking telecommunications more recently, makes the Board's proposed three-factor analysis in unit determinations even less meaningful in the banking industry. For example, as former Chairman Stephens has noted, "where those communication links facilitate the ability to engage in union activity among separate locations, geographic proximity in excess of one-mile should not effectively foreclose rebuttal of the single facility presumption." Stephens Comments on the proposed rule Aug. 25, 1995 (full text reprinted in the Daily Labor Report (BNA) No. 198, Oct. 13, 1995, p. E-9..

The narrow "extraordinary circumstances exception," based on temporary interchange of employees (a single facility unit may not be appropriate where 10 percent or more of the

unit employees have temporarily transferred to other facilities of the employer 10 percent or more of the time during the prior year) is arbitrary and without empirical support in the record. It seems to suggest that one way for banks and other industries to avoid the Board's irrebuttable presumption of the appropriateness of fragmented single facility units is to keep the employees on a conveyor belt between branches through frequent interchange. Indeed, as the proposed rule reveals, the threshold of 10 percent is not sufficiently high for the International Brotherhood of Teamsters, whose comments propose raising the level to 25 percent.

By circumscribing the "material" factors for future NLRB analysis in unit determinations into a mechanistic rule, and permitting only extremely narrow exceptions for adjudication, the proposed rule will, in effect, give controlling weight to the "extent of organizing" as dictated by the union's petitioned-for unit. This, despite the clear prohibition contained in section 9(c)(5) of the National Labor Relations Act: "In determining whether a unit is appropriate . . . the extent to which the employees have organized shall not be controlling." 29 U.S.C. § 159(c)(5). That section was added by Congress in 1947 to prevent the NLRB from conducting representation elections involving only those employees the union thinks it can count on to vote for it. To return to the abuses of the past by permitting the union to "gerrymander" a petitioned-for unit would frustrate the basic objectives of unit determination: i.e., to delineate an appropriate grouping of employees to permit freedom of choice while, at the same time, creating the proper context within which the process of collective bargaining must function. Recent NLRB Chairman James Stephens put the issue more directly in his statement opposing the proposed rule. Referring to the elimination of "centralized control" as a material factor in unit determination, Stephens wrote:

This is not a modest administrative change. It is a significant substantive change in well-settled law. It is a significant change in well-settled unit determination law to omit from any possible consideration the question whether control over nearly all of the core issues around which the interests of employees in a petitioned-for single unit would naturally coalesce is centralized at an administrative level beyond that facility. It is therefore a factor which should be weighed in determining a unit that is neither so large that it impairs the organizational desires of employees (which may be the case if a multi-facility unit is ordered) nor so small that it hampers efficient and stable collective bargaining (which may be the case if only a single facility unit is ordered). No evidence has been offered to demonstrate why this long accepted truth is no longer valid. Nor do I think that there is anything in the Board's cumulative experience to suggest otherwise. Thus to jettison this area of consideration from the Board's unit analysis simply for the sake of realizing marginal economies of process is, in my view, not rational.

Comments of Hon. James M. Stephens, August 25, 1995
 (full text reprinted in the Daily Labor Report (BNA), No.
 198, October 13, 1995, pp. E-6 et seq.)

IV. The NLRB's Stated Rationale for the Proposed Rule

The NLRB's asserted rationale for making what former Chairman Stephens describes as a "significant substantive change in well-settled [unit determination] law" is, as stated in the proposed rule, "to bring more clarity to the issue of appropriateness of bargaining units and to avoid lengthy litigation, possibly inconsistent results, and unnecessary expenditures of limited Board resources and the resources of the parties."

Of course, an objective analysis of the Board's caseload in this area not only fails to reflect an increased volume of litigation, but a substantial decrease in such litigation. Between 1980 and 1994, the Board reported 62 decisions concerning single location bargaining units, with only 11 reported cases during the last five years of that period. Reported banking cases account for fewer than that number over nearly the entire history of the National Labor Relations Board.⁶ This hardly represents lengthy or extensive litigation. The Board's economies, if any, derived from the proposed rule would appear to be, in former Chairman Stephens' words, "marginal."

By creating an irrebuttable presumption in favor of single location bargaining units, the proposed rule will indeed bring "more clarity" to the issue and will avoid "possible inconsistent results" since there will be little possible deviation from the rule. The same could be said, of course, for simply allowing a petitioning union to determine the unit through the "extent of organizing." The effect is nearly the same. Under the proposed rule, so long as the union is careful to petition for a unit consisting of at least 15 employees, supervised by a statutory 2(11) supervisor, in a facility which is beyond a one-mile geographical radius of another facility of the employer, the union will be virtually assured that the petitioned-for unit will be deemed irrebuttably appropriate without regard to the other circumstances or factual realities of the employer's operations or the interests of the employees.

Ignoring the common interests of employees by, for example, pitting the employees at one branch against those of another (where one branch is represented as a single facility and the others are unrepresented, or where branches are represented by different unions) will create friction in employee relations and chaos in labor relations. As the First Circuit

⁶See, e.g., Wyandotte Savings Bank, 245 NLRB 943 (1979); Bank of America, 196 NLRB 591 (1972); Pacific National Bank of Washington, 192 NLRB 1046 (1971); Wells Fargo Bank, 179 NLRB 465 (1969); Central Valley National Bank, 154 NLRB 995 (1965); Bank of California, 2-RC-4084 (1960) (unpublished decision.).

spoke in NLRB v. Purity Food Stores, Inc., 376 F.2d 497 (1967), cert. denied, 389 U.S. 959 (1968):

It seems to us obvious that . . . only friction between employees and chaos in labor relations could possibly result if some employees were under union rules as to wages, hours, seniority, grievance procedures, etc., when the employees working beside them in the same category were not. The Board's conclusion to the contrary flies in the face of reality. 376 F.2d at 500-501.

The proposed rule will result in unreasonable fragmentation of virtually identical bank branches with identical procedures, operations and personnel policies, with nearly identical employee skills, functions and working conditions, and where there is little local autonomy. None of these factors, however, will be relevant in unit determinations under the proposed rule.

The effect, if not the purpose, of the proposed rule will be to facilitate union organizing in small, fragmented, single facility bargaining units which are easier for unions to organize and where the union may have difficulty in attracting broader support among larger units of employees. Perhaps in addition to Chairman Gould's calculator and odometer, which he has said is all that will be necessary to administer the proposed rule, the Board should present newly-elected AFL-CIO President John Sweeney with a starter's whistle for the race to organize single location bargaining units in all industries, including banking, which are covered under the proposed rule.

V. Specific Suggestions

1. The American Bankers Association suggests that the NLRB's Proposed Rule on Single Location Bargaining Units should be withdrawn. The NLRB has failed to produce a sufficient empirical basis for the stated rationale that the proposed rule is necessary to reduce a litigation burden on the agency and the parties. To the contrary, analysis demonstrates that there are few litigated cases concerning single location bargaining units, and the number is declining.

2. If relieving budgetary constraints is the true basis for the proposed rule, then perhaps Congress should consider the effects of reducing the need for extensive professional agency staff responsible for unit determination questions. While the Chairman's reference to the need for only a "calculator and odometer" is undoubtedly a rhetorical flourish, if the proposed rule is promulgated it does suggest an ability to reduce staff resources currently devoted to this area of the agency's specialized expertise.

3. Section 9(b) of the Act and the Supreme Court's decision in American Hospital Association v. NLRB, 499 U.S. 606 (1991) give the Board authority to resolve

disputes regarding appropriate bargaining units by using its rulemaking authority. That authority is not without limits. As the Court reaffirmed with equal clarity in American Hospital Association, such rulemaking must not be arbitrary or capricious and, citing Motor Vehicles Manufacturers Assn. V. State Farm Insurance, 463 U.S. 29 (1983), must be "based on substantial evidence and supported by reasoned analysis." (*Id.* at 43.)

We have suggested that the Board should withdraw the proposed rule. In the alternative, the Board should keep the record open for additional comments and schedule hearings before promulgating a final rule. Delaying promulgation of the proposed rule is compelled by Board tradition, as well, where it has been a consistent practice not to reverse precedent or make major substantive changes absent a full Board, nor to make such changes based on the vote of a recess appointee to the Board. If, in fact, Board Member Fox, who currently serves as a recess appointee, participates in the rulemaking to give the Board a quorum, such actions should be subject to legal challenge.

4. Finally, if the Board promulgates a final rule, Congress should consider the most appropriate means of reversing the rule, either through a specific appropriations rider or a legislative amendment.

ATTACHMENT

SUMMARY OF BANK REGULATORY REQUIREMENTS

I. BANK SAFETY AND SOUNDNESS

REQUIREMENT FOR ANNUAL ON-SITE EXAMINATIONS

MANDATED ANNUAL INDEPENDENT AUDITS REQUIRED
MANAGEMENT REPORTS

BANK QUARTERLY CALL REPORTS

- SMALL BUSINESS/SMALL FARM LOAN REPORTING

BANK HOLDING COMPANY REPORTS

HOLDING COMPANY GUARANTIES/CROSS-GUARANTIES

REGULATIONS RESTRICTING INTERBANK LIABILITIES,
REGULATION F

COLLECTION OF CHECKS AND OTHER ITEMS BY THE FEDERAL
RESERVE, REGULATION J

TRANSACTIONS WITH AFFILIATES -- SECTIONS 23A AND
23 B RESTRICTIONS

DEPOSITS: RESERVE REQUIREMENTS, REGULATION D

- RESTRICTIONS ON CASH MANAGEMENT ACCOUNTS/
TELLERS CHECKS

WRITTEN POLICIES REQUIRED BY SUPERVISORS

CHANGE IN BANK CONTROL APPROVALS AND RESTRICTIONS
(See also BANK STOCK LOAN REPORTING)

LIMITS ON LOANS-TO-ONE BORROWER
(See also RESTRICTIONS ON INSIDER LOANS)

CAPITAL ADEQUACY REGULATION
(See also PROMPT CORRECTIVE ACTION)

- LEVERAGE RATIO

- RISK-BASED CAPITAL
 - CREDIT RISK
 - INTEREST RATE RISK
 - CONCENTRATION RISK
 - NONTRADITIONAL ACTIVITIES RISK

MINIMUM SECURITY DEVICES, REGULATION P

CRIMINAL REFERRAL FORMS

RESTRICTIONS ON INSIDER LOANS, REGULATION O

- INDIVIDUAL LIMITS
 - GENERAL LIMITATIONS
 - ADDITIONAL LIMITATIONS ON EXECUTIVE OFFICERS
- AGGREGATE LIMITS

ASSESSMENT OF FEES

- OCC EXPENSES PAID BY NATIONAL BANKS
- FDIC AUTHORIZED TO COLLECT EXAMINATION FEES

RISK BASED DEPOSIT INSURANCE PREMIUMS

MANAGEMENT OFFICIAL INTERLOCKS, REGULATION L

CREDIT BY BANKS FOR THE PURCHASING OR
CARRYING MARGIN STOCK

APPROVAL PROCEDURES: CHARTERING, BRANCHING, RELOCATION
OFFICES, POWERS

- BRANCH CLOSINGS

PROMPT CORRECTIVE ACTION CAPITAL LEVELS AND PROCEDURES

REGULATOR-IMPOSED BANK PERFORMANCE STANDARDS

OPERATIONAL AND MANAGERIAL STANDARDS FOR
BANK OPERATIONS

LIMITS ON PAYMENTS TO BANK OFFICERS, DIRECTORS
AND EMPLOYEES

- LIMITS ON COMPENSATION
- LIMITS ON RETIREMENT/SEVERANCE BENEFITS

RESTRICTIONS ON STATE BANK POWERS

LIMITATIONS ON BROKERED DEPOSITS/REGULATED
INTEREST RATES

RESTRICTIONS ON REAL ESTATE LENDING

MANDATORY REAL ESTATE APPRAISALS

II. ACCOUNTING

MARKET VALUE ACCOUNTING

REGULATORY ACCOUNTING DIFFERENCES FROM GAAP

- ACCOUNTING FOR INTANGIBLES
- ACCOUNTING FOR INCOME TAX LOSSES
- SALES OF ASSETS WITH RECOURSE

III. "CONSUMER PROTECTION"

TRUTH IN LENDING, REGULATION Z

FAIR CREDIT AND CHARGE CARD DISCLOSURE ACT

HOME EQUITY LINES OF CREDIT DISCLOSURE

CONSUMER LEASING, REGULATION M

ELECTRONIC FUNDS TRANSFER ACT, REGULATION E

FUNDS AVAILABILITY, REGULATION CC

REAL ESTATE SETTLEMENT PROCEDURES ACT OF 1974 (RESPA)

- SETTLEMENT SERVICES
- ESCROW ACCOUNTS
- MORTGAGE SERVICING TRANSFERS
- EXTENSIONS IN COVERAGE
 - REFINANCING
 - SUBORDINATE LIENS
 - LOSS OF COMMERCIAL, AGRICULTURAL,
AND OTHER EXEMPTIONS

INTEREST ON DEPOSITS

DISCLOSURE RULES FOR DEPOSIT ACCOUNTS, REGULATION DD
(TRUTH IN SAVINGS)

LOANS IN AREAS HAVING SPECIAL FLOOD HAZARDS

FDIC DEPOSIT INSURANCE COVERAGE

- RECORDKEEPING AND REPORTING
- CUSTOMER NOTICES

IV. "FAIR" DISTRIBUTION OF CREDIT

EQUAL CREDIT OPPORTUNITY ACT, REGULATION B

CREDIT PRACTICE RULE, REGULATION AA

FAIR CREDIT REPORTING ACT

COMMUNITY REINVESTMENT ACT

FAIR HOUSING

HOME MORTGAGE DISCLOSURE ACT

V. GOVERNMENT CONVENIENCE

ESCHEAT

PUBLIC AVAILABILITY AND PUBLICATION OF CALL REPORT

INTERNATIONAL INVESTMENT SURVEY REPORTS

BANK SECRECY ACT: CURRENCY RECORDKEEPING
AND REPORTING ACT

INTEREST INFORMATION REPORTING

MORTGAGE INTEREST REPORTING

INDIVIDUAL RETIREMENT ACCOUNT ("IRA") REPORTING

FORECLOSURES AND ABANDONMENT REPORTING

CERTIFICATION OF FOREIGN STATUS

IRS LEVIES ON CUSTOMER ACCOUNTS

IRS SUMMONS OF CUSTOMER RECORDS

BANK STOCK LOAN REPORTING

VI. REMEDIES\PENALTIES

CIVIL MONEY PENALTIES

REQUIRED PRIOR APPROVAL FOR CERTAIN CHANGES IN
BANK OFFICERS AND DIRECTORS

EXPANDED REGULATORY AUTHORITY TO RESTRICT
BANK OPERATIONS

REGULATORY AUTHORITY TO REMOVE BANK OFFICERS
AND DIRECTORS

REGULATORY AUTHORITY TO REMOVE DEPOSIT INSURANCE

CIVIL AND CRIMINAL FORFEITURE PROVISIONS

SANCTIONS AGAINST BANK PERSONNEL -- INCLUDING BANK
DIRECTORS, ATTORNEYS AND ACCOUNTANTS

- CRIMINAL

- ADMINISTRATIVE

- LOSS OF PERSONAL ASSETS WITHOUT DUE PROCESS

TABLE 1

Number of Bank Branches

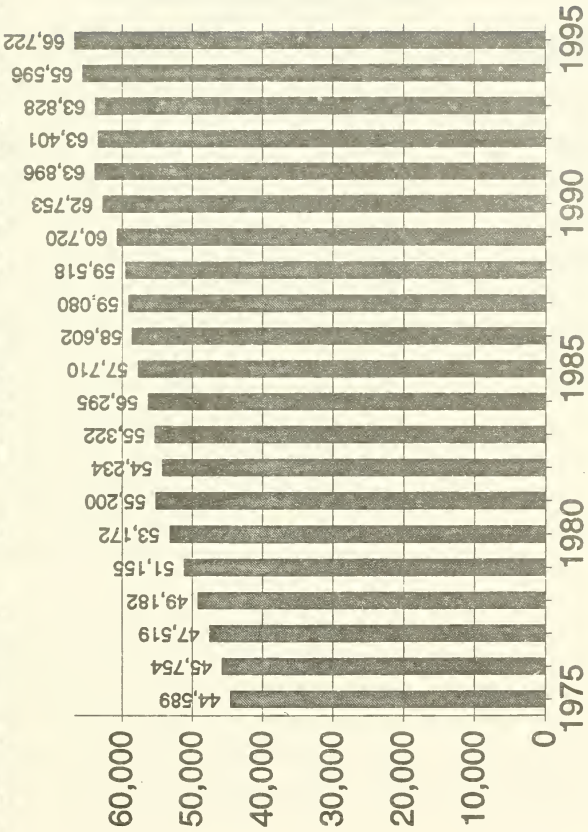


TABLE 2

BANKS IN THE UNITED STATES

Bank Asset Size (\$Million)	No. of Banks	Average No. Branches Per Bank
0-50	4,283	0
50-100	2,546	2
100-300	2,151	4
300-500	395	9
500-1,000	271	15
1,000-3,000	211	28
3,000-10,000	129	82
10,000 +	69	238

TESTIMONY OF PETER J. FORD
ASSISTANT GENERAL COUNSEL,
UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO
ON BEHALF OF THE AMERICAN FEDERATION OF LABOR -
CONGRESS OF INDUSTRIAL ORGANIZATIONS
REGARDING THE NLRB'S PROPOSED RULE
ON SINGLE LOCATION BARGAINING UNITS
MARCH 7, 1996

My name is Peter Ford. I am Assistant General Counsel to the United Food and Commercial Workers International Union, and am appearing here today on behalf of the AFL-CIO. We thank you for extending the opportunity to testify regarding the National Labor Relations Board's proposed rule on single location bargaining units.

At the outset, the AFL-CIO believes that the notice-and-comment procedure of the Administrative Procedure Act provides an adequate forum for persons seeking to influence the Board regarding the merits of the proposed rule. The AFL-CIO itself hopes to influence the Board to make certain changes in the rule through the timely filing of written comments with the agency. Accordingly, we do not appear here today with the intention of debating the merits of the specific provisions of the proposed rule. We will, however, briefly discuss the feasibility and desirability of the Board's use of rulemaking to determine appropriate single-location bargaining units.

The proposed rule is addressed to the question of the circumstances under which a group of employees who work together at the same facility should be allowed to obtain a representation election at their workplace without including among the voting group other employees working at other locations. It is the AFL-CIO's position that the Board's decision to proceed by rulemaking

on this question is both legally sound and eminently sensible.

In the first place, § 9(b) of the National Labor Relations Act requires the Board to decide "whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof...." Under the statutory scheme, "the initiative in selecting an appropriate unit resides with the employees...[who] may seek to organize 'a unit' that is 'appropriate' -- not necessarily the single most appropriate unit." American Hospital Ass'n v. NLRB, 499 U.S. 606, 610 (1991) ("AHA"). In determining whether a requested unit is appropriate, the Board's task is "to insure to employees the full benefit of their right to self-organization and to collective bargaining...." Id. at 611. This task "involves of necessity a large measure of informed discretion and the decision of the Board, if not final, is rarely to be disturbed." Packard Motor Car Co. v. NLRB, 330 U.S. 485, 491 (1947).

Although § 6 of the Act authorizes the Board to "make, amend, and rescind" rules to carry out the Act's provisions, until recently the Board made unit determinations exclusively through case-by-case adjudication, despite "broad...agreement in the legal community...that the exercise of the Board's dormant substantive rulemaking power [was] long overdue." American Hospital Assn. v. NLRB, 899 F.2d 651, 655 (7th Cir. 1990) (collecting authorities), aff'd, 499 U.S. 606 (1991). The Board's first foray into

substantive rulemaking -- its rule setting forth appropriate bargaining units covering part of the health care industry -- was unanimously upheld by the Supreme Court in AHA. In sustaining the Board's authority to determine units through rulemaking, the Court quoted Professor Kenneth Davis' statement that "[s]ensible men could not refuse to use such instruments and a sensible Congress would not expect them to." AHA, 499 U.S. at 612, quoting K. Davis, Administrative Law Text § 6.04, p. 145 (3d ed. 1972). The Court further observed:

in regard to the Act's underlying policy, the goal of facilitating the organization and recognition of unions is certainly served by rules that define in advance the portions of the work force in which organizing efforts may properly be conducted. [499 U.S. at 613.]

The Board's health care unit rule has met with well-deserved praise, see Grunewald, The NLRB's First Rulemaking: An Exercise in Pragmatism, 41 Duke L.J. 274 (1991), and prompted the Administrative Conference of the United States to remark to the Dunlop Commission that "the Board has finally joined the rest of the government in seeing the merits of using rulemaking rather than case-by-case adjudication to make policy in certain situations." Brian C. Griffin, Chairman, to Dr. John T. Dunlop (June 14, 1993). The merits of using rulemaking -- which, as Judge Richard Posner has observed, include "a gain in certainty, predictability, celerity, and economy," American Hospital Assn., 899 F.2d at 659 -- apply with equal force to the subject matter of the proposed rule.

Under the current regime of case-by-case adjudication, the Board has "consistently found that a single-location unit in a

multi-location enterprise is a presumptively appropriate unit for bargaining." Haag Drug Co., 169 NLRB 877, 878 (1969). In the large majority of cases in which employees request an election in a single-facility unit while their employer contends that only a multi-facility location unit is appropriate, the Board finds the requested unit appropriate, but often only after there has been extensive litigation over the issue.

One reason why litigation may be viewed as a viable option is that in determining whether the "single-location presumption" has been rebutted, the Board incorporates a vague, multi-factor "community of interests" analysis. This analysis purportedly covers:

factors such as central control over daily operations and labor relations, including the extent of local autonomy; similarity of skills, functions, and working conditions; degree of employee interchange; distance between locations; and bargaining history, if any. J & L Plate, Inc., 310 NLRB 429, 429 (1993) (citation omitted).

(In practice, however, the Board has placed principal weight on three factors: employee interchange; geographical proximity; and local supervision.) This "Talmudist" method of adjudging the appropriateness of requested bargaining units (Estreicher, Policy Oscillation at the Labor Board: A Plea for Rulemaking, 37 Ad. L. Rev. 163, 172 (1985)), under which the Board purports to review "all the circumstances of the case," Sav-On Drugs, 138 NLRB 1032, 1033 (1962), may be familiar to experienced labor lawyers, but the Board's method makes it "difficult for the outside world to know which factors, if any, are critical." Subrin, Conserving Energy at the Labor Board: The Case for Making Rules on Collective Bargaining

Units, 32 Lab. L.J. 105, 109 (1981).

Compounding the problems of delay and uncertainty engendered by the Board's current approach to determining single location units is that it invites "reviewing courts...to look over the Board's shoulder and do their own weighing...." Id. at 110. The courts of appeals tend to demand that the agency "justify the conclusion that the totality of the factors suggesting community of interest preponderates over the opposing criteria" and explain "exactly why the overall evidence favoring a [single location] is, in the context of the immediate facts, less significant than opposing evidence...." NLRB v. Purnell's Pride, Inc., 609 F.2d 1153, 1160 (5th Cir. 1980); see also NLRB v. Chicago Health & Tennis Club, Inc., 567 F.2d 331, 336-40 (7th Cir. 1977), in which the court undertook its own weighing of the various community of interest factors.

If adopted, the Board's proposed rule will have the salutary effect of simplifying the single-location presumption in the majority of situations. It cannot seriously be disputed that "the factors of geographical proximity, employee interchange, and managerial independence" -- the "three crucial factors" which the proposed rule places exclusive reliance on -- "would almost certainly outweigh any remaining relevant factors." Purnell's Pride, 609 F.2d at 1160, 1161; see R. Gorman, Basic Text on Labor Law 78 (1976). Moreover, unusual cases otherwise covered by the rule would continue to be adjudicated under an "extraordinary circumstances" exception.

Simply stated, the proposed rule would not affect the outcome in the vast majority of unit determination cases in which the appropriateness of a single-location unit is disputed. This is because in all but a handful of those cases wherein the Board purported to rely on such other factors as centralized control over labor relations, the presence of one or more of the three crucial factors -- close geographical proximity, substantial employee interchange and lack of local supervisory autonomy -- served to rebut the single-location presumption. E.g., Dayton Transport Corp., 270 NLRB 1114 (1984).¹ Neither the statute nor logic requires the Board to continue to make unit determinations based on factors which, in its judgment, have rarely been -- and should not be -- outcome determinative. The Board's "judgment [need not] be supported by all, or even most, of the potentially relevant factors," Electronic Data Systems Corp. v. NLRB, 938 F.2d 570, 573 (5th Cir. 1991) (citations omitted); indeed, "the weight assigned by the agency to each factor it has fairly considered is a matter for it to determine." NLRB v. Living and Learning Centers, Inc., 652 F.2d 209, 214 (1st Cir. 1981) (citations omitted).

The claim asserted by some opponents of the proposed rule that it would effect a wholesale overruling of Board precedent is overblown. However, to the extent that some Board decisions would be effectively overruled by the proposed rule, § 6 of the Act

¹ In Haag Drug Co., 169 NLRB at 879, the Board expressed the view that "central administration...is of little significance in determining the [single-location unit] question."

plainly allows the Board to "amend" or "rescind" its rules (including those rules established by adjudication) in a notice-and-comment rulemaking proceeding, as long as the Board's action is supported by a "reasoned analysis." ABA, 499 U.S. at 618-19 (citation omitted); NLRB v. Action Automotive, Inc., 469 U.S. 490, 495 n.4 (1985) (Board's policy "not undermined by the fact that it has modified and refined its position"). It is apparent that the Board has solicited comments and supporting information from all interested parties in the rulemaking proceeding so that its final analysis regarding the proposed rule will be a reasoned one.

By clearly establishing that in a large class of cases workers will be allowed to vote on a workplace basis if they so choose, the proposed rule fosters what the Supreme Court in ABA called the "central purpose" of the Act, namely, "to protect and facilitate employees' opportunity to organize unions to represent them in collective-bargaining negotiations." 499 U.S. at 609. Accord, American Hospital Assn., 899 F.2d at 654 (Act's "principal purpose...was and is to protect workers who want to organize for collective bargaining"). Given that the Act's primary purpose is to foster union organizing, opposition to the proposed rule by business groups premised on the mistaken claim that it "serves only one purpose -- to boost union organizing," B. Mower, Board Proposal Favoring Single Facility Bargaining Triggers Business Opposition, BNA DLR (January 29, 1996), p. A-1, is singularly unpersuasive. Plainly, the Board is entitled to give "the interest in employees to be represented by a representative of their own

choosing...greater weight than that accorded to the employer in bargaining with the largest, and presumably most convenient possible unit." NLRB v. Western and Southern Life Ins. Co., 391 F.2d 119, 123 (3d Cir. 1968).

Another benefit of the proposed rule is that it would result in substantial cost savings to the Board, as well as to the parties, by reducing the number and length of representation hearings and by streamlining the Board's decision-making process. In view of the House of Representatives' efforts to reduce the Board's fiscal year 1996 budget by 30 %, the Board's judgment that the proposed rule would conserve its increasingly limited and declining resources surely has considerable force. Obviously, Congress cannot have it both ways: if the Board must continue to resolve disputes over single- versus multi-location bargaining units on a case-by-case basis, Congress needs to provide the Board with adequate funding to manage its case load.

Finally, the proposed rule should significantly reduce the lengthy delays that inevitably result from protracted litigation over the appropriateness of requests by workers to vote for or against union representation on a single-location basis. The problems that delay poses to workers' organizing efforts are real and substantial. Commentators have pointed out the deleterious effects that delays in the Board's administration of the Act have on employee free choice. E.g., Weiler, Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA, 96 Harv. L. Rev. 1769 (1983). And such delays have led some AFL-

CIO affiliates -- including my own, the UFCW -- to adopt policies of avoiding the Board's election procedures whenever possible. See Grunewald, The NLRB's First Rulemaking: An Exercise in Pragmatism, 41 Duke L.J. 274, 316 & n.218 (1991).

The case of Manor Healthcare Corp., 285 NLRB 224 (1985) provides a graphic portrayal of the consequences of delay in the determination of the appropriate unit. In April, 1983, UFCW Local 27 petitioned for a representation election to be held in a unit of 140 service and maintenance employees at Manor Healthcare's nursing home in Rossville, Maryland. The employer contended that the unit must include the service and maintenance workers at two of its other nursing homes, each located about 12 miles away.

The Board's Regional Director found the employees at the Rossville home to be an appropriate unit. The employer requested the Board to review the Regional Director's decision. On June 15, 1983, the day before the election, the Board agreed to review the decision. However, instead of following its usual practice of allowing the election to take place and impounding the voters' ballots pending its decision, the Board stayed the election.

Nothing happened for over four years. Finally, on August 6, 1987, the Board unanimously affirmed the Regional Director's decision. Applying its traditional community of interest criteria, the Board concluded that the single-location presumption was un rebutted. The Board directed the Regional Director to conduct the election, but the election never took place. Only a handful of the 140 workers employed at the Rossville home when the

representation petition was filed still worked there in August, 1987. Under the circumstances, the union reluctantly withdrew its petition.

The Manor Healthcare case is an apt illustration of the maxim: "Justice delayed is justice denied." Adoption of the proposed rule would significantly reduce -- if not completely eliminate -- the chance of similar travesties from occurring in the future.

**STATEMENT OF CHAIRMAN WILLIAM B. GOULD IV
TO THE SUBCOMMITTEE ON REGULATION AND PAPERWORK
OF THE COMMITTEE ON SMALL BUSINESS
OF THE U.S. HOUSE OF REPRESENTATIVES**

**HEARING TO EXAMINE THE ISSUES SURROUNDING THE
NATIONAL LABOR RELATIONS BOARD'S RULEMAKING CONCERNING
SINGLE LOCATION BARGAINING UNITS IN REPRESENTATION CASES**

Delivered by:

**William B. Gould IV
Chairman
National Labor Relations Board**

**10:00 a.m.
March 7, 1996
Committee on Small Business
Hearing Room 2359
Rayburn House Office Building
Washington, DC**

Thank you, Chairman Talent, for your invitation to appear here today. I am pleased to have this opportunity to testify to you about our rulemaking initiatives in connection with disputes involving single versus multiple location matters in representation proceedings. My appearance here today marks the second anniversary of the date on which I was sworn in as Chairman of the National Labor Relations Board in Stanford, California, March 7, 1994, and I regard our proposed rule as one of a number of important initiatives through which federal labor policy, as enunciated by Congress, can be implemented more effectively.

As you know, the Board, with the concurrence of all four of its then current members,¹ is engaged in a rulemaking proceeding under the Administrative Procedure Act concerning requested single location bargaining units. Rulemaking by the Board is specifically authorized by Section 6 of the National Labor Relations Act, and the Board's use of rulemaking to determine appropriate bargaining units in representation cases was recently approved by a unanimous Supreme Court in American Hospital Association v. National Labor Relations Board, 499 U.S. 606 (1991).

One of the oft-cited advantages of this type of decision-making is that it provides a forum for all affected parties to make their opinions known. Thus, it enables the Board to hear from anyone who is interested in the subject under consideration, not just the litigants to a single case who may be primarily, if not solely, interested in the result in that case. In this rulemaking proceeding, there is a prolonged period -- until March 15 of this year -- for employees, employers, labor organizations, business organizations, academics -- indeed anyone who might be interested -- to make known their views on the proposed rule. In this proceeding, the Board actually took the extra step of providing an advanced notice of proposed rulemaking on June 2, 1994, and even at that early stage received comments from interested parties.

We ask for comments not only because that is the procedure established by the Administrative Procedure Act, but because we genuinely want to know what our clientele thinks, and which of our proposals they believe to be feasible or unfeasible, desirable or undesirable. I assure you we will seriously consider those comments; indeed, that is our obligation, if our rulemaking is to be upheld in the courts of appeals.

In the health care rulemaking to which I have alluded, we received over 1800 comments. After studying the comments, we made a number of important changes to the rule initially proposed. For example, we responded to an AFL-CIO concern about the definition of an "acute care hospital" by revising the rule to encompass an

¹ Since the Proposed Rule was published last September, President Clinton has appointed a new Board Member, Sarah M. Fox. She has not yet had an opportunity to express her views on this subject.

alternative definition. 54 FR at 16344. We responded to employer concerns by removing nursing homes, psychiatric hospitals and rehabilitation hospitals from the coverage of the rule, because the comments persuaded us that these facilities were not sufficiently uniform, and our knowledge not sufficiently developed, to enable us to promulgate a rule concerning bargaining units in those types of facilities. 53 FR at 33928-30; 54 FR at 16343. We responded to other employer concerns by removing requested units of five or fewer employees from coverage of the rule. 54 FR at 16341-42.

I note that the health care rule has met with well-deserved praise from practitioners representing both labor and management, academics, and others, including the Administrative Conference of the United States. That rule has saved the Board and many parties before it many thousands of dollars in resources which otherwise would have been devoted to processing these cases. Prior to the Board's adoption of the health care rule and its approval by the Supreme Court, the various United States Courts of Appeal issued numerous, often conflicting, decisions that resulted in the parties having no clear guidance as to what bargaining units ultimately would be found appropriate. See, e.g., 52 FR at 25142-43. Since that time, in contrast, court litigation has been virtually nonexistent. Indeed, since the Supreme Court's ruling in American Hospital Association, only about two or three cases directly involving that issue have resulted in litigation before the courts of appeal. The health care rule was opposed by many, including two former Board Members, but it has proven to be an efficient, and, indeed, preferable alternative to handling health care cases by adjudication.

In the midst of the comment period, I feel somewhat uncomfortable coming before you now to address any substantive concerns you might have about the Board's current rulemaking effort. The Board has neither reviewed nor analyzed all the over 100 comments received thus far. A little more than a week remains of the thrice-extended comment period. The contents of the proposed rule will be the subject of extensive and careful consideration by the Board Members after all comments have been received and reviewed. Any observations by me now would in my opinion be premature, to say the least, and perhaps even inappropriate.

In a letter of December 15 sent to my office, Chairman James M. Talent responded to concerns that I had raised during a meeting of December 7 as follows:

While you are correct in your view that a rulemaking undertaken pursuant to the Administrative Procedure Act can prove a forum for the presentation of varying views, my experience has been that this is often an inadequate forum for small businesses. It should come as no surprise to you that the vast majority of small business owners are not regular readers of the Federal Register. Because of this, it is often helpful to focus small business attention on a potential regulatory

approach by making that proposal the subject of an oversight hearing.

On January 3, 1996, I responded with a letter to Chairman Talent which stated as follows:

In your letter [of December 15] you state that the 'vast majority' of business owners are not regular readers of the Federal Register. I would be grateful if you could supply me with the names of such employers. I will personally undertake to send copies of our notice to them so that they are able to participate in our procedures. Alternatively, or in addition thereto, if you wish to send our notice to such employers, I would be most grateful indeed.

I remain concerned with duplication of the quasi-judicial deliberative process contemplated by the statute and the potential for inappropriate political interference.

Some of you have previously requested, in your letter dated November 17, 1995, that the Board hold public hearings on the current rulemaking proposal. That was a matter to which the Board gave considerable thought. There were public hearings on the health care rulemaking, the Board's first substantive rulemaking effort. However, a neutral observer, Professor Mark Grunewald of Washington and Lee University School of Law, who was commissioned to study the Board's rulemaking effort, has expressed the opinion that "as a legal matter, . . . and perhaps as a practical matter, the hearings were procedural overkill and the burdens created by the number and structure of the hearings would have to be considered as part of the overall cost-benefit evaluation of the rulemaking." 41 Duke LJ 274, at 319-320. Moreover, prospects of a severe budget shortfall now make the expense of public hearings, as opposed to, simply, the notice and comment period required by the APA, even more problematic.

The Board's Notice of Proposed Rulemaking attempted to explain in detail why at least three members of the Board were tentatively persuaded that rulemaking was a good thing in this area, and what type of rule we were considering. That proposal encompassed almost 50 typewritten pages when submitted, and many pages in the Federal Register. I invite your attention to it, but will briefly state what the rule as tentatively proposed provides. First, however, I think it important to set forth an overview of the history and nature of the proposed rule.

The Tentative Nature of the Rule

On May 27, 1994, following internal debate and study, the Board agreed to begin a public examination of how it could best fulfill its statutory obligation to

determine an appropriate unit when a single location bargaining unit is sought. On that date, the full five-Member Board unanimously approved an Advanced Notice of Proposed Rulemaking (ANPR) which proposed, for purposes of discussion only, promulgation of a rule or rules to limit to the extent possible the necessity to engage in traditional litigation of that issue on a case-by-case basis. See ANPR, 59 FR 28501 (June 2, 1994). The Board explained, *inter alia*, that it was publishing the ANPR "to seek timely comments and suggestions from the public, labor organizations, employer groups, and other interested organizations." The Board specifically stated that:

Given the fact that the Board has made no decision on the propriety of any form of rulemaking in this area, we invite all interested parties to comment on (a) the wisdom of promulgating a rule or rules on this issue . . . , and (b) the appropriate content of such a rule or rules.

Board Members Stephens and Cohen attached a separate statement to the ANPR explaining the reason they joined the Chairman and other Board Members in promulgating the proposal:

Unlike case adjudication, an advance notice proceeding such as this will enable the Board to solicit comments from a broad cross-section of interested persons before making a final decision on the relevant issues, including whether rulemaking is at all warranted, whether (and how) the substantive law defining the pertinent factors that can rebut the [single facility] presumption should be changed, and whether indeed extensive (and perhaps unnecessary) resources are being expended litigating this unit question. . . .

During the advance notice and comment period, the Board received 41 written comments from unions, employers, trade associations, policy organizations, and individuals. After careful and lengthy consideration of the commentators' suggestions and arguments, the Board, on September 22, 1995, issued the Notice of Proposed Rulemaking (NPR) that is the subject of this hearing. See NPR, 60 FR 50146 (September 28, 1995).

In the NPR, the Board proposed, *for the specifically stated purpose of obtaining comments and suggestions from all interested parties*, to issue a rule specifying the decisive factors that would determine the appropriateness of requested single location bargaining units. The Board repeatedly, in approximately 20 separate references, solicited specific comments on the proposed factors, and repeatedly stressed that the proposed factors advanced in the NPR were tentative and subject to change after the various interested parties' comments were reviewed. Indeed, in the prefatory Summary section of the NPR, 60 FR at 50146, the Board explained that:

The Board is publishing this notice to seek timely comment and suggestions from the public, labor organizations, employer groups, and other interested organizations . . . [W]e emphasize that the rule we are proposing is just that—a proposal—and not a final decision on what the rule, if any, should be. In some sections of this document we are more tentative than others and have specifically invited commentary or empirical information. In other sections we have not expressly asked for comments but nonetheless welcome them.

The tentative nature of the NPR led Member Cohen to join me and other Members² in soliciting public response to the specific rule being proposed. 60 FR at 50157.

The Substantive Provisions of the Rule

The proposed rule would apply to all employers except those in the construction industry, public utilities, and crews on ocean-going vessels. The rule is coextensive in scope of application with case precedent involving the Board's single facility presumption. The Board currently applies a presumption that a requested single location unit is an appropriate unit. The presumption is based on Board decisions which note, inter alia, that the "plant unit" is listed as one type of unit that is appropriate for collective bargaining in Section 9(b) of the Act. See, e.g., Kearfott Company, 112 NLRB 979 (1955). To the extent that Board precedent "prefers" a single location unit over a multi-facility unit when the former is requested, this presumption is not a result of this proposed rule; rather, it results from the application of many decades of well-settled precedent emanating, in large part, from the Act itself.

The proposed rule would deem appropriate single location bargaining units only where all of the following requirements are satisfied: (1) no other facility of the employer's is located within one mile of the requested facility; (2) there are 15 or more employees employed at the requested facility; and (3) a supervisor (as defined in Section 2(11) of the Act) is present at the requested facility for a regular and substantial period. In addition, the proposed rule would not apply where the level of interchange between employees at the requested facility and at other facilities of the employer involves 10 percent or more of the requested facility's employees for 10 percent or more of those employees' time. If all of the above requirements are not satisfied, the rule would not apply and the case would require litigation in the traditional manner. Finally, even if all the foregoing requirements are met, the proposed rule includes an "extraordinary circumstances" exception to allow for adjudication or individual treatment of unique cases. This exception is modeled on

² Member Stephens' term on the Board expired prior to issuance of the NPR.

the similar provision in the Board's Health Care Rule. See Collective Bargaining Units in the Health Care Industry, 54 FR 16336 (April 21, 1989).

Apart from those factors listed above, the Board proposed that the large number of factors now ostensibly cited and applied by the Board in these cases would not, under the proposed rule, be considered to establish that a single location unit is appropriate. It was our view in the NPR that while many factors have been cited and considered to some extent, only these few factors have made a material difference in the outcome of the overwhelming majority of single location cases. The elimination of these other factors was suggested in the ANPR and, as noted in the NPR, 60 FR at 50154, virtually none of the industry, policy organization, or trade association commentators addressed the factors or language that was proposed as part of the rule. The Board stated that it expected with the publication of the NPR that more comments would be forthcoming as to the proposed rule's content, and specifically invited comments as to what factors should and should not be included in the rule. Id. Let me take this opportunity to again invite commentators to tell us what factors should be in the rule and why.

Before addressing why the Board is proposing this rule, I wish to point out that the proposed rule does not change the current statutory scheme that requires a preelection hearing in representation cases unless the parties stipulate to all matters. Section 9(c)(1) of the Act and Section 102.63(a) of the Board's Rules require that an "appropriate hearing" be conducted if there is "reasonable cause to believe that a question concerning representation affecting commerce" exists. Angelica Healthcare Services Group, 315 NLRB 1320 (1995). The scope of the unit, therefore, may be governed by the rule but all other issues (including whether the prerequisites to application of the rule are satisfied) would be decided by adjudication. Hence, even if the proposed elements in the rule are satisfied for a particular requested unit, a party will not be denied the opportunity for a hearing.

While much of our reasoning is greatly detailed in the ANPR and NPR, I will briefly summarize it here. The Board selected the single location case area for rulemaking because of the uniformity of the factors usually deemed determinative in these cases; the litigation and Board resources that are expended on each case; the need for greater predictability and consistency in outcomes of single location cases; and the recognized benefits of deciding representation cases by rule. The Board believes that the proposed rule will result in the parties knowing in advance the relevant and decisive standards the Board will apply, and what types of evidence the Board will look to; there will be more consistent and predictable results; a reduction in single location litigation will occur; and savings to the Board, the labor bar of union and management lawyers, and the public will accrue.

While the Board does not maintain overall statistics on the precise number of cases raising single location unit issues, there is no question that they arise with

frequency at the Board. See, for instance, The Developing Labor Law, 468-72, P. Hardin editor (3d ed. 1992).

And they continue to arise with frequency today. At the end of 1994, the Board examined 26 of its most recent cases in which requests for review were decided by the Board on issues involving single versus multi-location units. While the purpose of the study was to examine the number of transcript pages in each hearing (longest: 1,921 pages — shortest: 3 pages); the elapsed time in each case between the filing of the petition and the conduct of the election (longest: 552 days — shortest: 62 days), and the number of employees in each requested unit (highest: 390 — lowest: 4), the study, as well as our experience, indicates that these cases continue to arise regularly before the Board. The list does not include the balance of cases presenting single or multi location issues that arose in 1994, nor the number of cases processed by each Regional Office in which review was not sought. Clearly, these are not cases which arise once in a “blue moon.” And, particularly in this period of austerity when resources are in such desperate need of preservation, this is a matter which causes particular concern to me, as Chairman, and to the Agency.

Further, while the Board may issue only a relatively small number of published cases addressing single or multi location issues within a given year, that is a false indicator of the time and resources which must be devoted to resolving these disputes. Many representation cases are unpublished, either because they have not been appealed to the Board (even though they may have involved lengthy litigation at the Regional level) or because the Board simply denies a party’s request for review (the vast majority of which are not published) or otherwise deems its decision to be routine and not worthy of the effort and expense of publication. Also, many stipulation conferences are protracted because of disputes over the appropriateness of single location units. The processing of all these cases involves the collective staff time of clericals, staff attorneys, Regional Directors, and Board Members, among others. It also includes the Board-incurred expenses for the court reporter and, sometimes, interpreters and/or rental of a hearing room, and, frequently, travel expenses for the Board’s hearing officer.

We do not believe there is any question that the Board expends significant personnel and monetary resources on the processing of single location cases. Economy in these areas was one of the reasons the Board initiated this rulemaking, as indicated in the ANPR (59 FR at 28501) and NPR (60 FR at 50149). Recent events, concerning which I am sure the members of this Subcommittee are well aware, have only emphasized the need for the Board to pursue all possible measures of economy. In this era of government downsizing and limited resources, it is incumbent on the Board to examine its processes with a view to “doing more with less.” The proposed rule is one, though far from the only, initiative undertaken by the Board that would further these efforts.

We also believe that neither the public nor the labor bar should have to guess the results in these cases. As a general proposition, there is too much labor law guesswork which invites wasteful litigation and, in this situation, promotes a kind of "crap shoot" -- as I told the Senate Committee on Appropriations, Subcommittee on Labor, Health and Human Services, Education and Related Agencies on February 6, 1996.

More consistent and predictable outcomes could best be achieved through a rule because unlike adjudication, the parties will know in advance the specific evidence necessary for a requested unit to be appropriate. The rule will be of greatest assistance in those close cases where the outcomes are controlled not only by the factors to be applied, but in part by the Board Members' different philosophies and subjective views as to the correct results. For example, compare Dayton Transport Corp., 270 NLRB 1114 (1984), with Bowie Hall Trucking, 290 NLRB 41 (1988). These cases presented the same issue of whether the appropriate unit for collective bargaining was the requested single location trucking terminal or a multi-terminal unit, and involved similar (but not identical) facts. In Dayton Transport, the Board found that the presumption had been rebutted and that only the multi-location terminal unit was appropriate, reversing a Regional Director's Decision finding the single terminal unit appropriate. Only four years later, a panel from an entirely new Board addressed the identical issue in Bowie Hall Trucking but reached the opposite result, finding that the single location presumption had not been rebutted and the single location terminal was appropriate, again reversing the Regional Director.

Thus, different panels of Board Members, sometimes even those appointed by the same president (as in these cases), have sometimes decided cases differently, even though the cases involved similar fact patterns and essentially the same issues. The practical result of these different outcomes is unpredictability and an instability in Board decision-making. We believe that the same unit should not be appropriate under one set of Board Members yet inappropriate under another group of Board Members. A rule would largely end these flip-flop decisions by the Board because everyone will know, in advance, the evidence needed to find a unit appropriate.

I also wish to assure this committee that the Board is cognizant of and intends to be responsive to concerns regarding the possibility that this rule would unduly fragment employers' workforces. That is why the Board specifically asked in the commentary to the rule for comments addressing any available empirical evidence regarding the feasibility for bargaining in workforces which are organized by single location versus those which are organized on a multi-location basis. NPR, 60 FR at 50149, Section II. A. 6. We continue to welcome those comments and any others.

In conclusion, by citing many factors, while in practice relying principally on only a few, the Board has invited litigation, and a form of crap shoot that a

particular Board or Board panel will decide a case a particular way. The average business person, employee, and even the labor bar and academics find it difficult to understand or reconcile the hundreds of cases involving this issue. But they will be able to understand if the Board by rule sets forth, in simple and clear language, what is necessary for a requested single location unit to be appropriate.

Perhaps having a clear, simple rule is not music to the ears of the litigators who come back to the Board time and time again to reinvent the wheel (at the expense of their clients). Our belief is that the current approach often wastes Government and private resources on litigation by parties seeking improbable outcomes. The Board believes it can save the taxpayers (and the litigators' clients) money by clearly, rather than ambiguously, setting forth the circumstances under which a single location unit will be appropriate, and, tentatively, that it is proper to do so.

Finally, as the jurisdiction of this Subcommittee is regulation and paperwork affecting small businesses, I would like to assure the Members of the Subcommittee that we will be sensitive to the impact of this proposed rule on small businesses. Let me say again that we welcome comments from all on this subject, including comments from small businesses. It is my belief that this rule will save small businesses attorney's fees and other litigation costs, not increase these expenditures. Under the current treatment of these cases, a small business which faces a petition often must hire a lawyer or consultant to litigate this issue at a hearing, analyze the many cases on this subject, and prepare legal briefs to the Regional Director and, possibly, the Board. The small business person will not know if the requested unit is appropriate until after the final conclusion of all these proceedings. Under the rule, however, in most cases, an employer should know in advance if a single location unit is appropriate, without the need for this extended litigation and related expenditures.

My colleagues and I at the Board look forward to receiving from any interested party any comments that would be helpful to us in resolving the issues posed in our rulemaking proceeding.

Thank you very much.

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IN THE HOUSE COMMITTEE ON SMALL BUSINESS
REGULATION AND PAPERWORK SUBCOMMITTEE

MARCH 7, 1996

TESTIMONY OF THE INTERNATIONAL FRANCHISE ASSOCIATION

DELIVERED BY

HAUNANI SUE LIN KEKUNA
PRESIDENT AND FOUNDER
K & I MANAGEMENT/THE COFFEE BEANERY

Good morning Mr. Chairman and members of the subcommittee. My name is Haunani Kekuna, and I am appearing here today on behalf of the International Franchise Association.

The International Franchise Association is the oldest, largest and only trade association which represents both franchisors and franchisees. IFA has more than 30,000 members operating in dozens of different industries. Since 1960, the IFA has worked to promote a healthy and vibrant regulatory climate for the successful expansion of franchising.

IFA's members include some of the most recognized names in the retail and service industries, who have proven that franchising provides unique advantages over traditional methods of distributing goods and services. Franchising works in many different industries because its unique flexibility allows franchise companies to adapt quickly to changes in consumer needs in a competitive marketplace.

I am here to share IFA's opposition to the rule proposed by the National Labor Relations Board.

Small businesses like mine are faced with countless challenges to their success. To add another government burden like the proposed rule will further diminish our chances for success. This proposal would deny small businesses like mine the opportunity to show, at a hearing, the reasons why single unit organizing may not be advantageous or fair for either the management or the employees in an integrated, multi-unit business like many franchises. In addition, there appears to be no compelling reason to change the current practice of evaluating single-unit organizing requests on a case-by-case basis.

For any retail or service operation, labor costs are a major component of the total costs of running the business. Increases in workers' and unemployment compensation taxes, health care and health insurance costs and other employee benefits already limit the ability of many U.S. small businesses to compete in a global marketplace.

The proposed NLRB rule further threatens our ability to compete globally and to maintain uniformity and consistency within the organization. This is especially important in a franchised business, which depends on a seamless and transparent set of relationships to deliver customers a consistent and reliable experience with the brand. If enacted, this rule will expand the likelihood of increased costs,

limiting our ability to create jobs and opportunities for our current, and future, employees and their families.

In addition, we oppose this rule because it implies that all situations fit neatly within the confines of a single rule, and because it creates a rigid and inflexible structure that ignores the realities of the marketplace in which we as small businesses struggle daily to compete.

I am President and Founder of K & I Management, Inc., a company that operates three gourmet coffee franchised units. We have been in business since 1988 and annually employ 30 to more than 50 employees. Our experience is similar to that of many thousands of small businesses around the U.S.

Like many franchisees, I operate more than one location. During the course of any business week, I may have employees and managers working at several different units, depending on the time of the year, the level of activity at certain stores and the travel and family schedules of my employees.

Though I operate several locations, the management and operational control for the entire business is mine. I do not manage each unit independently, but rather manage each unit as part of an integrated whole. The proposed rule would treat each of my units as if it were an independently operated business, and ignores the fact that while there are multiple locations, the centralized management function is

essential to the success of the enterprise.

Of the nearly 550,000 franchised businesses in the U.S., many are operated by businessmen and women like me who have more than one location. The proposed rule is a threat to all of these small businesses, who would no longer have an opportunity to demonstrate at a hearing the similarity of skills, functions, and working conditions of their employees, the centrality of control of their businesses and the degree of employee interaction within those businesses.

All of these are factual determinations which potentially argue against single unit organizing, but as questions of fact would not be adequately explored under the NLRB's proposed rule. In the interests of time and expediency, the proposed rule would deny me a fundamental right -- the opportunity to state my case and explain the essential nature of centralized management to a franchised business.

Small business in general, and franchising in particular, have consistently been job creators during the past decade. As Fortune 500 companies lay off thousands of employees, those of us who operate small, independent businesses have successfully created employment opportunities and wealth for literally millions of Americans and their families.

If our nation is to enjoy the blessings of this successful pattern of employment opportunity and wealth creation, the federal government must not further burden

small businesses and their employees and families with costly and unnecessary regulations.

On behalf of the members of the IFA, and the thousands of other small business owners and operators around the country, I urge the committee to communicate our opposition to this rule to the NLRB, and ask that the proposed rule be withdrawn.

Thank you for the opportunity to be here today.



INTERNATIONAL MASS
RETAIL ASSOCIATION

1700 North Moore Street

Suite 2250

Arlington, VA 22209

TESTIMONY OF THE
INTERNATIONAL MASS RETAIL ASSOCIATION (IMRA)

BEFORE THE
SUBCOMMITTEE ON REGULATION AND PAPERWORK
COMMITTEE ON SMALL BUSINESS
U.S. HOUSE OF REPRESENTATIVES

ON
SINGLE-LOCATION BARGAINING UNIT RULES PROPOSED BY THE
NATIONAL LABOR RELATIONS BOARD (NLRB)

Presented by:
CURTIS L. MACK, ESQ.
MACK, WILLIAMS, HAYGOOD & McLEAN
MARCH 7, 1996

Good morning, Mr. Chairman and fellow members of the Committee. I want to thank you for the opportunity to answer your questions concerning the National Labor Relations Board's ("the Board" or "NLRB") proposed rule on the appropriateness of requested single location bargaining units in representation cases.

With regard to my background, I am a founding partner in the law firm of Mack, Williams, Haygood & McLean. The firm is composed of 15 lawyers with offices in Atlanta, Georgia; Boca Raton, Florida; and West Palm Beach, Florida.

I am a 1970 graduate of Akron Law School and I received an LLM degree in labor from the University of Michigan Law School in 1973. In addition to being in private practice since 1981, I taught at the University of Florida Law School in 1973-1974; I was General Counsel for the Florida Public Employees Relations Commission in 1974 and 1975; I was Regional Director of the National Labor Relations Board in Atlanta, Georgia 1976-1981, and I have been Chairman of the Human Relations Commission for the City of Atlanta since 1981. I am admitted to the bar in Ohio, Michigan, Florida, Illinois and Georgia.

I currently represent many growing enterprises in all aspects of labor and employment law, as well as Fortune 500 companies.

I am here testifying on behalf of the International Mass Retail Association. IMRA represents the fastest-growing segment of the retail industry, with 170 mass retailers that include discount department stores, home centers, category-dominant or specialty discounters, catalog showrooms, dollar stores, warehouse clubs, deep discount drugstores and off-price stores.

Collectively, IMRA retail members operate more than 61,000 stores in the U.S. and abroad and employ millions of Americans. IMRA retail members cumulatively represent over \$346 billion in annual sales. As high-volume, low-margin retailers, IMRA members are leaders in bringing value to the consumer.

Before responding to your questions, I want to express my deep opposition to adoption of the rule by the Board. The proposed rule, applicable to all industries except public utilities, construction, and ocean-going maritime crews, provides that where minimal threshold criteria are met, single location units automatically will be deemed appropriate for purposes of collective bargaining without any hearing or adjudication by the Board, except in "extraordinary circumstances."

Specifically, the rule applies if the employer has 15 or more employees at the site, there is no other location represented within one mile of the requested site, and there is a supervisor at the site for a regular and substantial period. An example of an extraordinary circumstance would be 10% or more of the unit's employees being temporarily transferred to other facilities of the employer for 10% or more of their time during the 12 months preceding the filing of a petition for election.

The NLRB's present practice is to determine whether a single location or a multi-location unit is appropriate on a case-by-case basis. Factors such as the central control of labor relations, job functions and skills, geographical proximity of locations, transfers and bargaining history, if any, are considered as important.

In general, this proposed rule is not needed and would be counter-productive to the best interests of labor policy because it would have an adverse impact on the growth and expansion of businesses.

Specifically, the rule also should not be adopted for the following reasons: it is a "no-brain" method for deciding most single location bargaining unit cases and replaces the flexible adjudication that has been used for the past 30 years; no compelling need has been shown for this drastic change of substantive policy. Contrary to the Board's contention, the rule would not result in less litigation; the rule would promote a proliferation and fragmentation of bargaining units that would discourage stable company-union relationships and deprive companies of flexibility to operate.

The rule would also create single-location units that would, under current law, be multi-unit bargaining units; and finally, because of technological changes linking workplaces, now more than ever, the determination of appropriate bargaining units requires a process that affords flexibility and allows for consideration of the particular circumstances of each case.

At the present time, a single plant or store unit location is presumptively appropriate. To determine whether the presumption has been rebutted, the Board looks to such factors as central control of labor relations, including the extent of local autonomy, similarity of skills, and working conditions; degree of employee interchange, distance between locations; and bargaining history, if any (J&L Plate, 310 NLRB 4291 (1993)).

The basic presumption in favor of single location units has remained constant for more than 30 years, but the Board has found circumstances sufficient to rebut this presumption in enough cases to raise questions

about the propriety of codifying the presumption into a rigid rule and denying both employers and unions the opportunity to be heard in issues except in "extraordinary cases."¹

Now that I have given you an overview of the reasons for my opposition to the rule, I will be more specific with regard to my objections. This rule would result in a proliferation and fragmentation of bargaining units. The proposed rule would permit a single location to be appropriate where under current law, a multi-facility unit would be deemed appropriate. This resulting proliferation of bargaining units will cause additional cost to thousands of businesses, a reduction in employers' flexibility to transfer employees from one location to another and increase the likelihood of labor unrest.

In the restaurant or retail industry, for example, employers would be forced to negotiate a number of collective bargaining agreements with two or more different units, each filled with different terms and conditions of employment, including wages, hours, benefits, work rules, holidays, seniority provisions and restrictions on the employers' ability to transfer and interchange employees.

Also, employers with different bargaining representatives in the same geographical area would be negatively affected by the cost structure of dealing with more than one bargaining representative. Additionally, there is the likelihood of several disputes in the same year if collective bargaining agreements have different expiration dates. In short, the proposed rule would hinder the efficient operation of businesses and threaten labor stability.

I also oppose the proposed rule because it is not based on substantial evidence, nor supported by reasoned analysis, and is therefore arbitrary and capricious. In *American Hospital Association v. NLRB*, 499 U.S. 606, 619 (1991), the U.S. Supreme Court said that the Agency's rule-making must not be arbitrary and capricious.

This proposed rule is contrary to Congressional prohibition spelled out in 9(c)(5) of the National Labor Relations Act which states that in determining whether a unit is appropriate, the extent to which the employees have

Twenty-First Century Restaurant Corp., 192 NLRB 881 (1991), holding that a single location unit was not appropriate where the employer operated 22 facilities in New York City area.

Waiakamilo Corp., 192 NLRB 878 (1971), holding that single location unit was not appropriate where employer operated five facilities within 15-mile radius on Island of Oahu and one on Island of Hawaii.

organized should not be controlling. The rule would be invoked only upon the union's request and not utilized if it wants a broader unit. Therefore, it is obvious that the controlling factor is the employees' organization, and this is contrary to Congressional intent.

This rule would also eviscerate the multi-factor test that has been used for more than 30 years. That test includes functional integration, centralized managerial control, common skills, transfers of employees and bargaining history. The Board has provided no cases to support its rejection of the functional integration test. Furthermore, Section 9(b) of the Act makes clear that Congress prefers case-by-case adjudication.

With regard to its rejection of centralized management and labor relations for a consideration, the Board claims that this is "wasteful and unnecessary." However, centralized control over labor relations has been determinative in prior Board decisions holding that one single restaurant is not an appropriate bargaining unit (*White Castle Systems Inc.*, 264 NLRB 267, (1982) single location bargaining unit is found to be inappropriate).

The one-mile rule is also arbitrary and is not supported by past Board precedent, which has found units up to 25 miles apart appropriate for multi-units (see *Globe Furniture Rentals, Inc.*, 298 NLRB 288 (1990)). The proposed rule also overlooks and ignores the practical realities of the businesses such as chain stores and restaurants. It fails to take into account such factors as the uniformity of policies and procedures; the same exterior, product, price, working hours -- all of which support multi-location bargaining units.

Additionally, there is no empirical evidence for the rule. The Board claims that most single units are appropriate and that there is extensive litigation delay because of the current process. However, there is no proof that the rule would increase certainty and reduce litigation. Between 1980 and 1984, there were a total of only 62 cases or an average of only four per year; however, from 1990 to 1994, there were only 11 cases or just two cases per year. This is hardly evidence of substantial litigation.

Furthermore, the proposed rule would not reduce litigation, as the "extraordinary circumstances" exception invites litigation. There will be as much litigation to construe this provision as occurs under present circumstances.

Moreover, the requirement that a "supervisor" be present for a "regular and substantial period" also invites litigation. The rule's supervisory presence requirement brings additional issues that are bound to generate

litigation. Determining who is supervisor is subject to substantial litigation today. There is every reason to expect that parties before the Board and the courts regularly will contest and litigate the status of persons alleged to be supervisors for purposes of meeting this threshold requirement of the proposed rule.

Even if there is a statutory supervisor at the location, disputes predictably will arise over whether he/she is present "for a regular and substantial period" within the meaning of the proposed rule. How much is substantial? What is regular? Given the inherent vagueness of these terms, such disputes also are sure to generate litigation. It is naive to believe that this proposed rule would be administered with less litigation than currently occurs. In short, there would be no efficiency gained by adopting this rule.

Finally, the rule fails to take into account the effects of modern technologies and methods of organization that connect geo-graphically separate workplaces. The rule reflects an outmoded concept of the workplace. It does not consider the reality of today's marketplace where a community of interest exists among employees, though they may be miles apart. The use of computers, electronic mail, voicemail, fax machines and video conferencing link two or more workplaces and negate the existence of separate identities at the separate locations.

In short, the proposed single-location bargaining rule runs counter to the best interests of balanced labor policy and would complicate, not simplify, matters for both employers and the Board. I would like to thank you for listening to my statement and I invite any questions you have.

Before the

U.S. HOUSE OF REPRESENTATIVES
COMMITTEE on SMALL BUSINESS

SUBCOMMITTEE
on
REGULATION AND PAPERWORK

Statement of
CON-WAY TRANSPORTATION SERVICES, INC.

ROCK MAGNAN
Vice President-Operations
2882 Sand Hill Road, Suite 210
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(415) 854-7500

March 7, 1996

Thank you for inviting me to comment on the issues surrounding the NLRB's rulemaking concerning single location bargaining units.

I have been involved with the transportation industry for 18 years. Currently I am the Vice President of Operations for Con-Way Transportation Services, Inc. (CTS). CTS is a regional less-than-truckload and truckload motor carrier. We have four operating components, Con-Way Central Express, Con-Way Southern Express, Con-Way Western Express and Con-Way Truckload Services. The first three are regional LTL operations. They pick up and consolidate freight for delivery overnight or second day in the regional market. The last is a national truckload and intermodal operation. Since our inception in 1983, we have grown to more than 14,000 employees with revenues over \$1.3 billion dollars in 1995. We are not a small business, but we do have over 300 service centers around the country, ranging in size from less than 10 to over 200 employees.

I understand the issue to be examined is the NLRB rulemaking concerning single location bargaining units in representation cases with focus on

the potential effect on small businesses with multiple locations. We are not a small business but we do have multiple locations some of which are relatively small.

To understand the effects of a single facility bargaining unit, one must understand the integration of the business. This is true whether the business is small or large. A presumption that a single facility is an appropriate unit cuts off the inquiry as to the community of interests of the employees and the viability of the bargaining unit as it operates within the integrated system.

Congress began the deregulation of the trucking industry in 1980. This resulted in a changing industry. Firms that survived and prospered found efficiencies and created service standards that were not seen prior to deregulation. Customers came to expect and then to demand lower prices and on time service. In order to satisfy these demands intense coordination and integration of operations is essential.

For illustration, let's look at the operations of a CTS regional carrier. It has multiple locations throughout a region. It tells shippers it will pick up and deliver freight overnight or second day, claims free, with a 98% success rate. By their very nature these operations must be integrated. There is computerized centralized dispatch. Drivers assigned to pick up and delivery routes may also perform linehaul or shuttle runs. Day-to-day interaction of drivers is a way of life

with drivers moving freight from one facility to another, working the dock and returning freight to the originating facility. In fact, drivers may have more contact with drivers from another service center than they do with employees of their own service center. There must be coordination of when pick up and delivery occurs, when freight leaves a facility and when it arrives. There is the opportunity for drivers to transfer between facilities. Employee relations are centrally adopted and the day-to-day administration of such policy is under centralized control. The listing of integrated factors could go on and on, but as a matter of necessity the operations must be cohesive and highly integrated in order to perform the operation competitively and efficiently and in order to satisfy customer demands.

If there is a presumption that a single facility is an appropriate bargaining unit, many of the above-factors would not be considered, resulting in a unit which does not reflect the community of interest of the employees or the viability of the unit. This would be true whether the business unit is large or small. It would do an injustice to the employees, the company and the small and larger customers they serve.

Transportation industry companies, especially the "less-than-load" segment of which we are a part, are either completely union or completely union free. If one simply takes a moment to think about this, the reason becomes clear. If there is an integration of operations, and interdependence among service centers, and if one of these service centers is represented by a union, how realistically could the operating conditions in that one unionized service center be different from the other service centers? How could a company operate with two different sets of work rules when a driver from one service center is taking freight to and from and working the dock at other service centers? Now take this a step further. There are two different unions which are each certified as the bargaining representative for separate service centers. Now there are potentially three sets of work rules. It goes on and on. An operation which required integration between multiple locations would be severely hampered by a requirement to bargain the terms and conditions of work separately for each location. The inefficiencies that would result would be reflected in the company's competitive position and its ability to service its customers. In our case, such a rule would pose a threat to our ability to provide our customers (many of which are small businesses) with the quick and efficient services they have come to expect.

This subcommittee needs to help the NLRB to understand that deregulation of the transportation industry has permitted efficient transportation practices, which have in turn greatly reduced the cost of shipments and

increased the service standards to businesses, including small businesses. The added costs and decrease in service inherent in permitting multi-union and multi-unit organizations among small interdependent facilities of a transportation company or of the many small integrated businesses which have two or more facilities, could lead to competitive disadvantages and inflated prices.

The NLRB should continue to allow inquiries into the facts of integration of operation, the centralization of labor relations and the community of interests of the employee and the viability of the bargaining unit in order to determine if a bargaining unit is appropriate. There should not be a presumption that a single location bargaining unit is appropriate.

Mr. Chairman, that concludes my testimony and I am prepared to respond to any questions you may have.

Testimony of

JoAnn M. Shaw
Vice President, Human Resources and Support Services
University of Chicago Hospitals and Health System

on Behalf of

the Society for Human Resource Management
and the
American Society for Healthcare Human Resources Administration
of the
American Hospital Association

on the National Labor Relations Board's
Proposed Rule
Related to Single Location Bargaining Units
in Representation Cases

Before the

Subcommittee on Regulation and Paperwork
of the
Small Business Committee

U.S. House of Representatives
March 7, 1996

Good morning. My name is Joann M. Shaw. I am Vice President of Human Resources and Support

Services at the University of Chicago Hospitals and Health Systems. I am appearing today on behalf of the Society for Human Resource Management (SHRM) and the American Society of Healthcare Human Resources Administrators (ASHHRA).

SHRM, the leading voice of the human resource profession, represents the interests of more than 70,000 professional and student members from around the world. SHRM provides its membership with education and information services, conferences and seminars, government and media presentation and publications that equip human resource professionals for their roles as leaders and decision makers within their organizations. The Society is a founding member and Secretariat of the World Federation of Personnel Management Associations (WFPMA) which links human resource associations in 55 nations.

ASHHRA is a professional membership group of the American Hospital Association. ASHHRA membership is made up of chief human resource officers from healthcare organizations across the country. This is the first time that SHRM and ASHHRA have had the opportunity to present joint testimony before the Congress.

I have over 22 years of experience as a human resource professional. Prior to joining the University of Chicago Hospitals and Health System in 1991, I held similar positions at Michael Reese Medical Center, Children's Memorial Hospital and the FMC Corporation.

I appreciate the opportunity to testify regarding the National Labor Relations Board's (NLRB's) proposed rule related to single location bargaining units in representation cases. If adopted, this rule

would automatically make a single location unit appropriate for collective bargaining purposes unless at the outset, an employer can establish that an "extraordinary circumstance" exists. It is apparent that the "extraordinary circumstance" exception will be exceedingly narrow.

Both SHRM and ASHHRA have profound concerns regarding the impact that this proposed rule would have on the healthcare industry. The healthcare industry is at a critical juncture. We are struggling to control costs so that our services can be widely accessible to the public at large and so that healthcare costs do not unduly burden our economy. At the same time, we are opening satellite community clinics and facilities to increase the accessibility of our services throughout society. By opening these small satellites in various communities, we hope to encourage all members of our society to obtain better healthcare.

Obviously, opening and maintaining these community based satellites has a cost attached to it. In order for these operations to be economically viable we must do all that we can to minimize their administrative costs and overhead. The Board's proposed rule profoundly concerns us because it would have precisely the opposite effect. Indeed, we believe that its application to our industry would be contrary to Congress's admonition against the proliferation of bargaining units when it extended the National Labor Relation Act's application to the healthcare industry in 1974.

Under current NLRB rules, each healthcare institution has the potential for, at most, eight bargaining units. However, it is not uncommon for community based operations to be opened just a few miles apart. If this proposed rule is adopted and applied to our industry, we face the substantial likelihood that the industry could have as many as 40 potential bargaining units. This would be true no matter how the institution is structured or the degree to which its facilities are integrated.

We are concerned that the probable proliferation of potential bargaining units at each new clinic or other satellite facility will discourage many institutions from opening new vital community operations. Further, if such small community facilities are opened and are confronted with multiple bargaining units, their continued economic viability may very well be jeopardized.

The healthcare industry understands and appreciates the fact that the Act encourages collective bargaining. We embrace that principle as well. We simply desire doing so on a basis that is practical and efficient so that it does not impair our ability to provide our services as broadly as possible. We firmly believe that this goal is better served by permitting our industry to continue to have the opportunity to have the historical single location unit factors adjudicated. An automatic, almost conclusive presumption that each of our facilities constitutes a springboard for several additional bargaining units will impede the availability of healthcare services to our society at large.

Thank you for the opportunity to testify on this important issue. I would be happy to answer any questions.



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VIRGINIA BROOKER BULLIS, JD, MSN, RN
PRESIDENT

GERRI MARLETT, MSN, RN
EXECUTIVE DIRECTOR

March 5, 1996

The Honorable James Talent
Chairman
Subcommittee on Regulation and Paperwork
Committee on Small Business
B-363 Rayburn House Office Building
Washington, D.C. 20515

RE: Single Location Bargaining Units

Dear Chairman Talent:

The American Nurses Association (ANA) would appreciate the inclusion of the following statement in the record for the hearing to be held on March 7, 1996 on Single Location Bargaining Units. ANA and its state and territorial constituent member associations represent the nation's two million registered nurses by fostering high standards of nursing practice and promoting the economic and general welfare of nurses in the workplace.

ANA supports the National Labor Relations Board's (Board) efforts in rulemaking to add clarity and predictability to the determination of what constitutes a single location bargaining unit. Previous Board rulemaking, related to the health care industry, was reaffirmed by the Supreme Court in their decision in *American Hospital Association v. NLRB*, 499 U.S. 606 (1991). Thus, ANA and its constituent members have had significant practical experience with rules related to bargaining units. ANA has found that rulemaking ensures a more consistent process in the determination of appropriate bargaining units and ultimately avoids inconsistent results. Rulemaking in this area, would, as it has with health care bargaining units, avoid unnecessary and extensive litigation and preserve the limited resources of both the Board and the involved parties.

Secondly, while this rule will decrease the need for litigation, there are exceptions for extraordinary circumstances created within the rule that provide mechanisms for due process and case-by-case adjudication. Therefore, in those cases where one party is able to demonstrate that extenuating circumstances exist and the rule should not apply, the Board will be able to review an individual case.

Finally, while some may argue that this rule creates a presumption in favor of unionizing, ANA would argue that the very principle established with passage of the National Labor Relations Act was that employees should be protected in their rights to organize into labor organizations. The action of self-organization and collective bargaining is an affirmative one and the Board is, by statute, bound to enforce the NLRA and this overarching principle.



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For Further Information, Contact: The National Nursing Organization, Inc.

The Honorable James Talent
March 5, 1996

Page Two

Thank you for the opportunity to comment on this critical issue. ANA believes that the Board should move forward in reviewing submitted comments and issue a final rule.

Sincerely,

A handwritten signature in cursive script that reads "Virginia Trotter Betts". The signature is written in dark ink and is positioned above the printed name.

Virginia Trotter Betts
President

g:\grefcap\union\elra\aglefac.hac
3/5/96



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

Washington, D.C. 20570

HAND DELIVERED

March 22, 1996

Honorable James M. Talent
Chairman, Subcommittee on Regulation
and Paperwork of the Committee
on Small Business
2361 Rayburn House Office Building
Washington, DC 20515

Re: Hearing to Examine the Issues Surrounding
The National Labor Relations Board's
Rulemaking Concerning Single Location
Bargaining Units in Representation Cases
Thursday, March 7, 1996

Dear Chairman Talent:

At the hearing, the question was raised about the number of cases the Board had to decide each year involving a single unit location issue. We have made a hurried search of both our published and unpublished decisions which reveals the following information.

First, with regard to recent fiscal years (1990 onto the present), I would note that, to my knowledge, the issue of scope of unit was raised or now is being raised in 311 identifiable cases:

Fiscal Year 1990:	50 Cases
Fiscal Year 1991:	54 Cases
Fiscal Year 1992:	42 Cases
Fiscal Year 1993:	47 Cases
Fiscal Year 1994:	52 Cases
Fiscal Year 1995:	53 Cases
Fiscal Year 1996:	13 Cases
(To date)	

Of these identifiable cases, the issue of appropriateness of requested single location bargaining units in R cases was raised in 247 (or 79.4 percent) of the cases.

Honorable James M. Talent
 March 22, 1996
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As high as both of these case numbers appear to be, they most likely could be argued to be grossly understated for the following two reasons. First, these numbers do not take into account those cases in which one or more parties may have "stipped" at the regional level to a unit or units other than preferred in order to avoid the necessity of a hearing and the consequent delay in the holding of an election. Absent regional reporting of every such case, it would be impossible even to venture an approximation of these number of cases. Secondly, the computerized case classification system which was established years ago to retrieve, inter alia, issue identification as coded at the regional level appears, at best, not to be working for the identification of cases raising the issue(s) of scope of unit. Theoretically, of course, this classification index should have caught every single R case coming to the Board on a request for review in which the issue(s) of scope of unit was litigated. However, a comparison strictly between the index and those clearly identifiable scope of unit requests for review which were received during the time period involved herein has adduced that the classification index identified only 11.25 percent (or basically one out of every nine) of these cases. I am not comfortable with proffering the suggestion that this could be interpreted as implying that the Agency could be experiencing nine times as many of these scope of unit cases, but I am most comfortable in suggesting that it is highly likely that the true count of these cases would be substantially higher in number than the numbers delineated above.

Secondly, with regard to cost, both in terms of person hours and of other expenses (transcripts, travel, attorneys' fees for the parties involved, etc.), it is nearly impossible for me to estimate the cost of processing either the scope of unit or the actual requested single location bargaining unit R cases. This could be done only with great effort Agency-wide and parties-wide. However, I would emphasize that all of the cases numerated above were litigated cases, and that all involved one or more days of hearing. There is mention in one of the cases, Heartshare Human (Hagerty), 29-RC-8451, of eight days of hearing, although this number seems minuscule in comparison to the R case which recently was transferred to the Board for decision: Peco Energy, 4-RC-18572. This case, which raises the issue of the appropriateness of the requested single location bargaining unit, required 49 days of hearing. The transcript alone is 7559 pages in length. During the most recent fiscal year, Fiscal Year 1995, out of the 37 cases in which the question of whether a single facility was appropriate was in issue, the single facility was found appropriate in 32, or 86.5 percent, of the cases.

Honorable James M. Talent
 March 22, 1996
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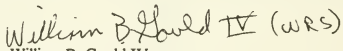
Attached are copies of five cases pertaining to this issue that I referred to at the hearing or that are relevant to this issue:

Haag Drug Company, Inc., 169 NLRB 877 (1968)
Kapok Tree Inn, Inc., 232 NLRB 702 (1977)
Eschenbach-Boysa Management Company, Inc., 268 NLRB 550 (1984)
d/b/a Red Lobster, 300 NLRB 908 (1990)
Executive Resources Associates, Inc., 301 NLRB 400 (1991)

I request that they be made part of the official record. Given the fact that you referred to former Chairman Stephens's statement which claimed that we were ignoring or discounting relevant criteria in the proposed rule, it will be of interest to you to see that Mr. Stephens himself did not go beyond the criteria contained in our proposed rule when he was engaged in the deliberative process of adjudication regarding the restaurant industry in d/b/a Red Lobster.

Finally, I wish to emphasize that some parties have a misconception about the current state of Board law on whether a single or multilocation unit can be an appropriate unit. That misconception is that current Board law does not allow single location bargaining units and that it only allows multifacility units. That is not the law. The Act itself, in Section 9(b), specifically states that a "plant unit" is an appropriate unit. Thus, the Board has permitted single location bargaining units since the inception of the Act. As we pointed out in the Advance Notice of Proposed Rulemaking (ANPR), 59 FR 28501 (June 2, 1994), the issue of the appropriateness of a single facility unit when requested by a labor organization has been an issue in Board proceedings for over 60 years. See e.g., Atlantic Refining Co., 1 NLRB 359, 364-65 (1936). In the mid-1950s the Board began to apply a presumption that a single location unit is an appropriate unit. See Kearfott Company, 112 NLRB 979 (1955). The presumption gradually has been applied by the Board to most industries under the Board's jurisdiction. Thus, the proposed rule does not change Board Law to allow single facility units; Board law already promotes such units if they are an appropriate unit. The proposed rule merely sets forth the decisive factors for finding single location units appropriate.

Very truly yours,

 (WRS)
 William B. Gould IV
 Chairman

Enclosures: (5)

Haag Drug Company, Incorporated, and Hotel, Motel, Cafeteria and Restaurant Employees and Bartenders Union Local No. 58, affiliated with Hotel & Restaurant Employees and Bartenders International Union, AFL-CIO, Petitioner. Case 25-RC-3429

February 16, 1968

DECISION ON REVIEW

BY CHAIRMAN McCULLOCH AND MEMBERS
FANNING, BROWN, AND ZAGORIA

On June 7, 1967, the Regional Director for Region 25 issued the attached Decision and Direction of Election in the above-entitled proceeding, in which he found the requested unit, consisting of 1 of the Employer's 11 restaurants, to be an appropriate unit for bargaining. Thereafter, the Employer filed a timely request for review of the Regional Director's Decision on the grounds that in making his unit finding he departed from National Labor Relations Board policy, that he made factual findings which were clearly erroneous, and that compelling reasons exist for the Board to reconsider its present policy as to the presumptive appropriateness of a unit comprised of a single location in a retail chain operation.¹ On June 29, 1967, the National Labor Relations Board, by telegraphic order, granted the request for review.

The Board has considered the entire record in this case with respect to the issues under review and hereby adopts and affirms the Regional Director's Decision and Direction of Election.

It was for many years our policy in retail chain-store operations to find that an appropriate unit should embrace all the employees within an employer's administrative or geographic area.² However, we reexamined this policy in *Sav-On Drugs, Inc.*, 138 NLRB 1032, and concluded that it had overemphasized certain factors and had unduly prejudiced the right of self-organization which the Act guarantees. As we said in that case (138 NLRB at 1033):

Reviewing our experience under that [our prior] policy we believe that too frequently it has operated to impede the exercise by employees in retail chain operations of their rights to self-organization guaranteed by Section 7 of the Act. In our opinion that policy has overemphasized the administrative grouping of merchandising outlets at the expense of factors such as geographic separation of the several

outlets and the local managerial autonomy of the separate outlets; and it has ignored completely as a factor the extent to which the claiming labor organization had sought to organize the employees of the retail chain. We have decided to modify this policy and to apply to retail chain operations the same unit policy which we apply to multiplant enterprises in general. Therefore, whether a proposed unit which is confined to one of two or more retail establishments making up an employer's retail chain is appropriate will be determined in the light of all the circumstances of the case.

Our experience has led us to conclude that a single store in a retail chain, like single locations in multilocation enterprises in other industries, is *presumptively* an appropriate unit for bargaining. In cases subsequent to *Sav-On Drugs*, we have consistently found such units appropriate unless countervailing factors were present.³ In the instant case, we have, as the Employer requests, again reviewed our policy in retail chain operations, and we conclude, for the reasons discussed below, that the policy comports with the purposes of the statute and is consistent with related Board policy, and therefore is entitled to continued adherence.

In order to establish a valid bargaining obligation, the Act requires only that a "majority of the employees in a unit appropriate" for bargaining freely designate a particular representative (Section 9(a)). (Emphasis supplied.) It is elementary that more than one unit may be appropriate among the employees of a particular enterprise, and our choice in a particular case "involves of necessity a large measure of informed discretion." *Packard Motor Car Company v. N.L.R.B.*, 330 U.S. 485, 491.

The basic statutory standard guiding the exercise of our discretion in this regard is Section 9(b), which directs us to select units to "assure to employees the fullest freedom in exercising the rights guaranteed by this Act"—which rights, of course, include both joining a labor organization or refraining from doing so (Section 7). Absent a bargaining history in a more comprehensive unit or functional integration of a sufficient degree to obliterate separate identity, the employees' "fullest freedom" is maximized, we believe, by treating the employees in a single store or restaurant of a retail chain operation as normally constituting an appropriate unit for collective-bargaining purposes. The employees in a single retail outlet form a homogeneous, identifiable, and distinct group, physically separated from the employees in the other outlets of the chain; they generally perform related functions under immediate supervision apart from employees at other

¹ In effect, the Employer, in its request for review, urges an employer-wide 11 restaurant (2 State) unit, contending that "every meaningful thing" about the single restaurant sought is "dependent on the enterprise of eleven (11) restaurants as a whole."

² See, e.g., *Safeway Stores, Inc.*, 96 NLRB 998; *Weiss Markets, Inc.*, 125 NLRB 148; *Daw Drug Co., Inc.*, 127 NLRB 1316.

³ See, e.g., *Frisch's Big Boy III-Mar, Inc.*, 147 NLRB 551, 151 NLRB 454, enforcement denied 358 F.2d 895 (C.A. 7); *Morris Lumber and Hardware Company*, 145 NLRB 1024, enf'd, 345 F.2d 770 (C.A. 9); *Puris Food Stores, Inc.*, 160 NLRB 651, enforcement denied 376 F.2d 497 (C.A. 1), cert. denied 389 U.S. 959; *Davis Cafeteria, Inc.*, 160 NLRB 1141. And see also *Capital Bakers, Inc.*, 168 NLRB 908.

locations; and their work functions, though parallel to, are nonetheless separate from, the functions of employees in the other outlets, and thus their problems and grievances are peculiarly their own and not necessarily shared with employees in the other outlets.⁴

Our conclusion in this regard is consistent with our practice in industries other than retail chains. We have consistently found that a single-location unit in a multilocation enterprise is a presumptively appropriate unit for bargaining. Thus, Section 9(b) of the Act specifically recognizes a "plant" unit as appropriate, and we have long held that a unit confined to the single plant of a particular employer is presumptively appropriate.⁵ And in the insurance industry, we have deemed the district office as that industry's analogue of a single-manufacturing plant.⁶ In each of these instances, the determinative factors in finding the single-location unit appropriate were those factors discussed above in supporting the appropriateness of a single-store unit in a retail chain. We are unable to perceive any reason why retail chain operations should be treated differently. Indeed, to draw a distinction between the single-chain store and the single plant in a multiplant enterprise or the insurance district office would artificially disadvantage the organizational interests of chain store employees, simply because their employer operates a chain rather than a single-store enterprise and would vest the chain operator with absolute power alone to control the scope of the appropriate unit.

Further, we do not believe that bargaining on a less than chainwide basis would prove disruptive to the chain employer's operation. Bargaining in less than employerwide units has been effectively conducted in other industries without such results, and no reason has been presented, nor are we aware of any, which indicates that the situation would be different in the retail chain industry. It does not necessarily follow that organization of only a portion of the chain would likely result in a lack of uniformity of working conditions through the chain or, if it would, that this necessitates rejecting a unit such as is here sought. In any event, though chainwide uniformity may be advantageous to the employer administratively, it is not a sufficient reason in itself

for denying the right of a separate, homogeneous group of employees, possessing a clear community of interest, to express their wishes concerning collective representation.

We are of course aware that retail chain operations generally are marked by a high degree of centralized administration. Thus, most retail chains maintain central profit-and-loss records of the individual stores, keep central payroll records, handle the chainwide purchasing and merchandising of goods, directly pay all vendors, and perform other similar functions. But these services, we must emphasize, are essentially recordkeeping or administrative functions that have little or no direct relation to the employees' day-to-day work and employee interests in the conditions of their employment. We find these functions are of little significance in determining whether or not the employees at a single location comprise an appropriate unit for bargaining. Centralized administrative control can be just as readily maintained whatever the scope of the bargaining unit. More significant is whether or not the employees perform their day-to-day work under the immediate supervision of a local store manager who is involved in rating employee performance, or in performing a significant portion of the hiring and firing of the employees, and is personally involved with the daily matters which make up their grievances and routine problems. It is in this framework that the community of interest of the employees in a single store takes on significance, for the handling of the day-to-day problems has relevance for all the employees in the store, but not necessarily for employees of the other stores.⁷ Accordingly, we believe that, where substantial autonomy is invested in a local store manager to handle the matters discussed above, this is more significant in determining the appropriateness of a unit than the existence of central recordkeeping and merchandising functions.

It is for these reasons that we will adhere to our policy in retail chain operations of finding the single store a presumptively appropriate unit. That presumption is of course not a conclusive one and may be overcome where factors are present in a particular case which would counter the appropriateness of a single-store unit. For example, we have been

⁴ This is not to say that units smaller than a single-location unit are inappropriate. In some circumstances, employees of a particular store (e.g., the meat department in a grocery store) may perform work of such a different nature from that of the other employees that a separate unit would be appropriate. *Mack Road Super-Duper, Inc.*, 156 NLRB 983. Nonselling employee units in department stores have also been found appropriate. *Retail Wholesale, and Department Store Union (Saks & Co.) v. NLRB*, 385 F.2d 301 (C.A.D.C.), *enfg.*, 160 NLRB 682. In this regard, we note that we have often found a departmental unit in a plant appropriate for bargaining. *S.D. Warren Compumv. v. NLRB*, 353 F.2d 494 (C.A. 1), *cert. denied* 383 U.S. 958.

⁵ Nor are we saying that a group of retail outlets would not likewise constitute an appropriate bargaining unit. Under conventional criteria governing the establishment of bargaining units, a unit composed of two or more retail outlets would also be an appropriate unit if there were a sufficient

degree of geographic or administrative coherence, and common interests of employees in the outlets.

⁶ See, e.g., *Temco Aircraft Corporation*, 121 NLRB 1085, 1088, *fn. 11*; *Dixie Belle Mills*, 139 NLRB 629, 631, *cf.*, *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 164-166.

⁷ See *Metropolitan Life Insurance Co.*, 156 NLRB 1408, 1414 (decision on remand from 380 U.S. 438), and cases cited therein.

⁸ This is true even in chain operations where the actual day-to-day supervision of a store is, in part, in the hands of a dual-function official, who daily divides his time between actual in-store supervision and the performance of central office functions. The handling of the employees' day-to-day problems is no less a local matter merely because the official responsible for the day-to-day supervision of the store also performs central office functions.

hesitant to disturb an existing, stable bargaining relationship, and, where such relationship has existed in a multistore unit and there is a reasonable expectation of continued stability in that unit, we will find the multistore unit appropriate. See *Meijer Supermarkets, Inc.*, 142 NLRB 513, and *The Great Atlantic & Pacific Tea Co., Inc.*, 153 NLRB 1549. Also, where an individual store lacks meaningful identity as a self-contained economic unit, or the actual day-to-day supervision is done solely by central office officials, or where there is substantial employee interchange destructive of homogeneity, these circumstances militate against the appropriateness of a single-store unit. See, e.g., *Mary Carter Paint Co.*, 148 NLRB 46; *Caribbean Restaurants*, 162 NLRB 676. And a combination of factors may lead to finding appropriate a citywide unit (two stores in a multicity chain), e.g., where the stores are geographically proximate, they are subject to common supervision, and employees are frequently interchanged between the stores. See *Spartan Department Stores*, 140 NLRB 608.

We are mindful of recent decisions by the U. S. Courts of Appeals for the Seventh and First Circuits, denying enforcement of single-restaurant and single-store units in retail chain operations. *Frisch's Big Boy Ill-Mar, Inc.*, 147 NLRB 551; 151 NLRB 454, enforcement denied 356 F.2d 895 (C.A. 7); *Purity Food Stores, Inc.*, 160 NLRB 651, enforcement denied 376 F.2d 497 (C.A. 1), cert. denied 389 U.S. 959. We note, however, that these holdings are inconsistent with decisions in these and other circuits affirming the Board's findings that single-store units were appropriate.⁸ Moreover, we believe those decisions unduly emphasized the relevance of central administration, a factor which, as discussed above, we feel is of little significance in determining the question. Also, we believe that both courts misinterpreted our holding in *Weis Markets, Inc.*, 142 NLRB 708. In that case, we found that a citywide unit (two stores) in a multicity chain was appropriate because of a combination of factors: the two stores were geographically proximate, there were frequent transfers of employees among the intracity stores, and the union sought no other unit while the employer argued that the two-store unit could not be appropriate. In stating our reasons for finding the citywide unit appropriate, we pointed out that our decision in *Sav-On-Drugs* had not eliminated the possibility that a unit coextensive with an employer's administrative or geographic area would be found appropriate, but had merely added the possibility that a single-store unit could also be appropriate. Our holding in *Weis Markets* is thus consistent with *Sav-On-Drugs* and

with our discussion here; *Weis Markets* merely stands for the proposition that citywide units may be appropriate for bargaining, despite the single-store presumption, where countervailing factors are present. Accordingly, we conclude that the court decisions in *Purity* and *Frisch* do not compel a reversal of our policy. Since we believe our policy in retail chain operations is consistent with the aims of the statute and with our policies in other industries, we will continue to adhere to the policy of finding single-store units presumptively appropriate until the Supreme Court rules on the issue.

In the instant case, the Regional Director has set forth the relevant facts in considerable detail, and we find it unnecessary to repeat those facts here. We note briefly, however, that the central headquarters performs those administrative and merchandising functions typically performed by the central office of a retail chain operation: it keeps all personnel and payroll records, it negotiates all contracts with vendors, it pays all bills and keeps all financial records, it establishes the budget for each individual restaurant, it maintains a profit-and-loss statement for each restaurant, it establishes pay scales for the particular jobs, and establishes all personnel policies. Also, a company vice president is in charge of all restaurant operations, and he is assisted by one official who oversees all the restaurant operations. Each restaurant has a manager, who orders all the restaurant's needs from the vendors, contracts for major repairs, does approximately 60 percent of the hiring, fixes wage rates within the ranges established by headquarters, trains employees, makes recommendations to headquarters with regard to employees, and discharges employees. As the Director found, transfer of employees among the restaurants is minimal.

From these facts, and those discussed in more detail in the Director's Decision, it is clear that no factors are present to rebut the presumption of the appropriateness of the single-store unit. The centralized administrative functions are related entirely to the Employer's own records and have little or no direct relation to the employees' day-to-day work. While employee benefits have been centrally established, and the uniformity thereof is of some significance, no greater control or uniformity has been shown here than is characteristic of retail chain store operations generally. We see no reason to permit this centralization to overshadow such important factors as infrequent interchange and communication among the employees of the various restaurants and the separate immediate supervision by the local manager who hires and fires the restaurant employees, rates employee performance, and

⁸ *NLRB v. Sun Drug Co.*, 359 F.2d 408, 412-413 (C.A. 3), enf. 147 NLRB 669; *NLRB v. Winn-Dixie Stores, Inc.*, 341 F.2d 750, 755 (C.A. 5), enf. 143 NLRB 848, 860-861, cert. denied 382 U.S. 830; *NLRB v. Werner Lumber and Hardware Company*, 345 F.2d 770,

771-772 (C.A. 7), enf. 145 NLRB 1024, cert. denied 382 U.S. 942; *NLRB v. Primrose Super Market of Salem, Inc.*, 58 LRRM 2863 (C.A. 1), enf. without opinion 148 NLRB 610, cert. denied 382 U.S. 830, motion for reconsideration denied 353 F.2d 675 (C.A. 1).

is involved in their day-to-day grievances and problems. Further, the functions of the employees at one restaurant are entirely separate from the other restaurants in view of the geographic separation and the minimal amount of interchange. Thus, we conclude that a single-restaurant unit here is an appropriate unit for bargaining.

Accordingly, the case is hereby remanded to the Regional Director for Region 25 for the purpose of holding an election pursuant to his Decision and Direction of Election except that the period for determining eligibility shall be the payroll period immediately preceding the date below.³

³ A corrected election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 25 within 7 days after the date of this Decision on Review and Direction of Election. The Regional Director shall make the list available to all parties to the election. No extension of time to file this list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. *Excelsior Underwear Inc.*, 156 NLRB 1236.

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before a Hearing Officer of the National Labor Relations Board. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to this Regional Director.

Upon the entire record in this case, the Regional Director finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purpose of the Act to assert jurisdiction herein.

2. The labor organization involved claims to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act.

4. The Employer operates a chain of 35 full-line and 6 discount drugstores in Indiana and Ohio, as well as 11 restaurants.¹ Six of the eleven restaurants are located in Indianapolis and the remaining five in Kokomo, Bloomington, Fort Wayne, and Marion, Indiana, and Lima, Ohio. Judicial notice is taken that restaurant 206, the establishment containing the unit sought by Petitioner, is located approximately 3 or 4, 5 or 6, 9 or 10, 11, and 14 or 15 miles, or an average of about 8 or 9 miles from the other five Indianapolis restaurants. The Employer

also franchises or licenses a number of independently owned enterprises, herein called licensees, to operate restaurants which, like all but one² of the Employer's own, use the trade name, "Huddle," and are in many respects difficult to distinguish from the Employer's own restaurants. Concededly, the licensee's restaurants are not part of the appropriate unit.

In the past, pursuant to petitions under the Act, representation elections have been held among (a) the Employer's warehouse³ employees in 1956, as well as (b) its drugstore employees (exclusive of restaurant employees) in four Indiana counties (including Marion County) in 1963 and 1966.⁴ No certification of representatives, contract, or history of collective bargaining resulted from any of the elections.

Headquarters of the restaurant operations, along with the drug operation, is located in the company office in Indianapolis. Among other functions it houses the corporate officers and offices. All Employer-owned Huddle operations are administered by Theodore J. Shaver, vice president of Huddle Restaurant operations, who stands on the same level of supervision as the vice president in charge of drug operations and immediately subordinate to Vice President in Charge of Sales Latter and Secretary-Treasurer Steele, who in turn are immediately subordinate to President Moxley. Personnel Director Martin, whose responsibilities are employerwide, reports to President Moxley and Secretary-Treasurer Steele. Liaison between Shaver and the store managers is maintained by a single supervisor, who, together with Shaver, visits the various restaurants checking on operations. Headquarters maintains substantial control over the operations of the various units. The Employer's president "in the final analysis" establishes labor policy and the comptroller prepares the various restaurants' budgets. Headquarters negotiates contracts with the vendors with whom the restaurants deal, and fixed asset expenditures require headquarters approval. Other elements of liaison or control are found in the fact that the restaurants remit or report cash intake to headquarters, and report purchases, sales, labor and other costs, warehouse requisitions, and hours worked by employees for payroll purposes. A plethora of standardized intracorporate forms are used for reporting purposes; i.e., each restaurant is not permitted to make its own forms. Based on the material submitted by the individual restaurants, headquarters prepares a monthly profit-and-loss statement for each restaurant. The Employer does not maintain a clerical force at the respective restaurants and substantial clerical and administrative work relating to the restaurants is

¹ An additional or twelfth restaurant was temporarily closed at the time of the hearing.

² Preemption of the name in Ohio by a competitor bars the Employer using the name, Huddle, for its Lima operation.

³ The warehouse services both the Employer's drug and restaurant operations.

⁴ Petitioner was one of two joint petitioners in the 1966 proceeding.

performed at the headquarters. Thus, the headquarters office recruits personnel, prepares paychecks, keeps and maintains financial, personnel, and other records, pays bills incurred by the restaurants, and administers workmen's compensation, and group insurance plans.³ Advertising is generally prepared or handled by the headquarters-located advertising department⁴ and the personnel department temporarily transfers employees between restaurants and drugstores to meet the daily needs of the organization. A maintenance department performs minor maintenance on Indianapolis operations. Costs of operation of the headquarters are prorated among the restaurants and the drugstores. Additionally, the Employer maintains a warehouse used by both the drugstores and restaurants, as well as some of the licensees as a source of supply.

An effort is made to maintain uniformity of appearance among the various restaurants. All save one⁷ use the trade name, Huddle,⁸ use "out front" or exhibition cooking, generally seat 105 to 120 persons,⁹ serve a standardized semipermanent menu,¹⁰ and have the same or similar kitchen equipment, parking facilities, decor, and general layout.¹¹ In many other respects, conditions are uniform at least in the restaurant division of the Employer's operation. Thus, there is a uniform pay scale subject to local variation within the established range, a uniform fidelity bond requirement, a standard operations manual,¹² which governs many personnel matters, and a standard or substantially standard policy governs the supply and laundering of uniforms, vacations, group insurance, holidays, discounts, paid leave of absence, meals, Christmas and Thanksgiving bonus, and timeclocks.

Local administration is vested in the restaurant manager. Each manager orders his own self-determined needs from suppliers selected by headquarters or the Employer's warehouse.¹³ Similarly, except for Indianapolis restaurants which use the Employer's maintenance crew for minor repairs, the manager, after determining the need therefor contracts with Employer designated mechanics for major and minor repairs. Although some hiring is done through headquarters, 60 percent of the hiring is done by the manager,¹⁴ who at the time of hiring, as well as throughout his employment, fixes the employee's pay rate within a rate range for each classification prescribed by headquarters.¹⁵ The manager trains and rates employees, makes recommendations as to employees with questionable ratings, and discharges employees. Although, as previously noted, in many respects there is uniformity in standard wages, hours, and working conditions throughout the Employer's operation, in other respects differences exist. Thus, many of the restaurants have different hours with concomitant different shift hours for employees. Employee classifications differ in various restaurants, some using a cashier-hostess, others simply a cashier and others, neither. Although, as noted above, the restaurants are generally of substantially the same size, the manning schedules vary from 2 part- and 13 full-time employees to 23 full- and 7 part-time employees.

Interchange and transfer between the various restaurants in the chain is insignificant and averages not more than 1.1 permanent and 2.5 temporary transfers per week¹⁶ in a group of approximately 200 employees.¹⁷

³ Of necessity, much of this work is done on the basis of facts and reports submitted by the individual restaurants.

⁴ As it is for many of the franchised restaurants.

⁷ See fn. 2, *supra*.

⁸ As do a number of the admittedly nonunit separately owned franchised restaurants.

⁹ Two of the eleven seat only 52 to 68 persons.

¹⁰ As do some of the franchised operations with minor exceptions.

¹¹ As do some of the franchised operations.

¹² Which is prepared by the Employer's central headquarters.

¹³ As do some of the franchised restaurants.

¹⁴ Subject to a check of whether the applicant is disqualified on the basis of prior unsatisfactory service.

¹⁵ Although both hiring and changes in range are subject to the approval or require the initials of the personnel director and the vice president in charge of Huddle operations, in view of their extremely slight contact with the employees, to say nothing of job applicants, it is found the effective power lies with the manager. Indeed, newly hired employees can be on the payroll and working before either of the two officials who allegedly must approve their hiring even know about it.

¹⁶ In connection with Petitioner's cross-examination of the witness who identified the exhibit that purported to reflect the degree of transfer and interchange of employees between the Employer's various restaurants, without objecting to Petitioner's questions, which went to the issue of why original and more complete records in the Employer's possession could

not have been submitted in lieu of the 10 week summary specially prepared for the hearing, Employer's counsel instructed its witness as follows: "I'll instruct the witness to tell the Union, attorney for Union, 'Because we didn't want to do it, goddammit.' Put a comma before the goddammit. That's on the record . . . I'll instruct this witness whenever I feel like it. Counsel is arguing with the witness." In response to Petitioner's explanation it was seeking to find out whether "this thing is representative or not," Employer's counsel asserted, "I instruct the witness to tell counsel for the union that you have nothing to say on the subject. We are not going to argue about this. All this is argumentative. If you want to attack this exhibit by innuendo, do that in your brief." In the circumstances, where Petitioner's attempt to explore the representative status of the Employer's statistics was seriously obstructed the exhibit must be carefully scrutinized. At the outset, it is noted that the Employer's business is affected and normally will be increased by holidays. Additionally, both Christmas and New Year's Day are paid holidays for employees. In such circumstances it is a reasonable inference that the Christmas-New Year's week would provide more than the normal number of temporary transfers. In point of fact, it appears that twice the average number of temporary transfers occurred in the 2-week payroll period ending December 31, which furnishes internal evidence within the exhibit itself that the Christmas-New Year's payroll period is not representative. That payroll period ending December 31, accordingly, has been disregarded in computing temporary interchange of employees.

¹⁷ Employees retain seniority and any and all benefits incident thereto in the case of temporary or permanent transfer.

Kapok Tree Inn, Inc. and Hotel, Motel, Restaurant Employees & Bartenders Union, AFL-CIO, Local No. 104, Petitioner, Case 12-RC-5252

September 30, 1977

DECISION ON REVIEW AND DIRECTION OF ELECTION

BY MEMBERS JENKINS, PENELLO, AND MURPHY

On March 30, 1977, the Regional Director for Region 12 issued a Decision and Direction of Election in the above-entitled proceeding. The Petitioner had sought a unit limited to the Kapok Tree Inn Restaurant located in Clearwater, Florida (hereinafter referred to as Clearwater), while the Employer contended that the appropriate unit ought to include its other facilities in Florida: the Kapok Tree Inn Restaurant in Madeira Beach (hereinafter referred to as Madeira Beach), the Kapok Tree Inn Restaurant in Fort Lauderdale (hereinafter referred to as Fort Lauderdale), and Baumgardner's Restaurant in Clearwater. The Regional Director found the appropriate unit to encompass Clearwater, Madeira Beach, and Baumgardner's.

Both the Employer and the Petitioner filed, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, timely requests for review of the Regional Director's decision. The Petitioner contends that the Regional Director departed from Board precedent in his determination of the scope of the unit and erred in his refusal to enlarge the time within which the Petitioner could submit a showing of interest within the unit expanded by the Regional Director's decision. The Employer argues on review that the Regional Director should have included the Fort Lauderdale restaurant in the bargaining unit.

By telegraphic order dated May 17, 1977, the Board granted the Petitioner's request for review and denied the Employer's request. Both parties filed briefs on review.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the entire record in this case with respect to the issues under review and makes the following findings:

Kapok Tree Inn Corporation, the parent corporation, located in Clearwater, Florida, owns and operates five separately incorporated restaurants. Aside from the Peter Pan restaurant in Maryland,

which is not involved in this proceeding, the remaining facilities are all situated in Florida. The Clearwater restaurant is located in the same building as the parent corporation, 100 yards from Baumgardner's restaurant. The Madeira Beach restaurant is approximately 19 miles and the Fort Lauderdale restaurant¹ is 250 miles from the Clearwater complex. There is no collective-bargaining history for the employees and no union seeks to represent them on a broader basis.

The parent corporation centrally administers its facilities, prescribing in detail guidelines for their operation. Corporate supervisors oversee the implementation of these policies by visiting the restaurants to confirm the quality of service and to evaluate the total operation. The corporate office performs all the major purchasing,² advertising, accounting, book-keeping, and capital improvements. Logistical decisions involving the projected needs for food, employees, and facilities are determined on a unit basis by the corporate supervisors.

Employment conditions are also set by corporate policy. Employee benefits, workmen's compensation, hospitalization, insurance, pension, and stock-sharing plans are administered by the parent corporation. The general guidelines for wages, hours, job classifications, and general working conditions are determined centrally and may not be modified on a unit level.

Nevertheless, under this administrative setup, each restaurant or unit has its own identity, balance sheet, supervisors, and employees. The local unit manager is responsible for the day-to-day operation of his restaurant. In addition to the normal ministerial tasks, such as opening and closing the restaurant, the unit manager translates the general corporate labor relations guidelines into the everyday specifics of the unit operation. Each restaurant advertises for interviews, and hires its own rank-and-file employees. The unit manager supervises the training of his employees. He has the authority to fire employees on the spot if egregious behavior is involved.³ Otherwise the local managerial staff periodically monitors the performance of its employees and makes recommendations relevant to discharge and promotion. When department head positions become vacant, the unit manager will interview and recommend employees. The unit manager has on occasion increased wages without the specific approval of the corporate office.

The unit manager also schedules the vacations, working hours, and days off of the individual employees. Allocation of waitress stations and other daily activities are within the discretion of the unit

¹ The Regional Director's decision to exclude the Fort Lauderdale restaurant from the unit is not at issue here since the Employer's request for review was denied.

² The restaurant managers do some direct purchasing from vendor lists.

³ The record revealed two such instances: an altercation between a waitress and a customer, and the filtering of liquor by a bartender.

managerial staff. Absences must be cleared at the unit level and employees clock in where they work. When circumstances warrant it, the unit manager may initiate overtime. If a facility is overstaffed on a particular night, the unit manager has the authority to send employees home.

Most labor relations problems appear to be resolved at the unit level. As a matter of general practices, which is reflected in the employees' manual (Empl. Exh. 3), employee grievances and requests are directed to the local supervisory staff. Management directives have been posted over the unit manager's signature and are sometimes concerned with only a single facility.

Aside from this substantial authority of the separate managerial staff at Clearwater, the record contains other evidence of Clearwater's independence from Madeira Beach and Baumgardner's. Reflecting its geographic distance, Madena Beach is operationally the least integrated of the three restaurants. It issues its own payroll checks and has its own checking account.

Employee interchange and communication between the employees at Madeira Beach and Clearwater is insignificant. Excluding the initial staffing when Madeira Beach opened in December 1972, only 17 rank-and-file employees have been involved in permanent transfers between the two facilities. There are approximately 316 employees at Clearwater, and approximately 225 employees at Madeira Beach.

Other rank-and-file intermingling is also limited since Madeira Beach has a full complement of employee departments. A few gift shop employees are temporarily shifted to aid in annual inventory and restocking during the busy season. Two or three times a year between three and five waitresses temporarily transfer to Madeira Beach from Clearwater. Maintenance employees and equipment are borrowed from Clearwater only when major work is required.

Even the working conditions vary between Madeira Beach and Clearwater, although officially those restaurants are identical in operation and format. According to the testimony of a waitress who works at Clearwater, there are differences in work station allocation, the number of tables worked by a team, cleanup procedures, workweeks, and rules for requesting days off.

Baumgardner's, however, due to its physical closeness to Clearwater, is not as self-contained as Madeira Beach. Baumgardner's obtains from Clearwater a number of services such as: maintenance, cleaning, gardening, laundry, food ordering, supplies, some stock and equipment storage, dinner reserva-

tions, and security patrols. Employee interchange is slightly more significant between Baumgardner's and Clearwater than is the interchange between Madeira Beach and Clearwater.⁴ Employees at both restaurants are paid with paychecks issued by Clearwater and they share the same parking lot.

Nevertheless, working conditions at Baumgardner's are substantially different from those at Clearwater. Unlike Clearwater, which is basically similar to the other Kapok Tree Inn restaurants, Baumgardner's is unique among the Employer's facilities in Florida. The menus, service procedure, uniforms, and operating hours are different only at Baumgardner's. Baumgardner's is a more formal restaurant catering to a different clientele. The waitresses and waiters there wear fancier uniforms. The service procedure is traditional; orders are taken from the guests after they are seated at their tables. At Clearwater, however, the customers order before they are seated and their food is brought to them later at a table. Bar service is also different at the two restaurants.

Clearwater is open continuously from 11:30 a.m. until 10 p.m. Monday through Saturday, and until 9 p.m. on Sunday. Baumgardner's, however, opens twice a day during the week; for lunch from 11:30 a.m. until 3 p.m., and then from 4:30 p.m. until 9:30 p.m. for dinner. On weekends the lunch hour is eliminated. These variations in operating hours are reflected in the working shifts of the employees.

Based upon the above findings and the entire record, we conclude, in disagreement with the Regional Director, that the Employer's restaurants are not so integrated as to overcome the presumptive appropriateness of a single-facility unit limited to the Clearwater restaurant.

When dealing with a multifacility operation, the well-established Board policy is to find a single-facility unit presumptively appropriate. This presumption can be overcome, however, by a showing of functional integration so substantial as to negate the separate identity of the single-facility unit. In making determinations on this issue, the Board looks to such factors as prior bargaining history, the geographical proximity to other facilities of the same employer, the degree of day-to-day managerial responsibility exercised by the branch facility management, the frequency of employee interchange, and whether the requested single-facility unit constitutes a homogeneous, identifiable, and distinct employee grouping. *Haag Drug Company, Incorporated*, 169 NLRB 877 (1968).

Although the Employer's operations evidence the centralized administration that is often characteristic

⁴ Occasionally temporary transfers of employees occur when an emergency need arises at one of the restaurants. There were, however, only approximately 41 permanent transfers from 1968 to 1977 (Empl. Exh. 14A).

of multifacility enterprises, such centralized administrative control does not by itself militate against finding the single-restaurant facility to constitute an appropriate unit. *Allegheny Pepsi-Cola Bottling Company*, 223 NLRB 45 (1976); *Michigan Bell Telephone Company*, 216 NLRB 806 (1975).

Clearwater is a distinct operation with its own work force, managerial staff, and balance sheet. Although restricted somewhat by corporate guidelines, the unit manager exercises substantial day-to-day authority in areas most directly affecting the employees. See *Levitz Furniture Corporation*, 223 NLRB 522, 524, fn. 23 (1976). The unit management represents the frontline authority to which employees are directed for their employment, their work conditions and assignments, and the resolution of their complaints.

Aside from the autonomy of its unit managerial staff, Clearwater's independence from Madeira Beach is also demonstrated by their geographical distance, the functional independence of operation, and the lack of significant employee interchange between the employees at Madeira Beach and Clearwater.

With respect to Baumgardner's, however, the geographic proximity and concomitant sharing of certain services and employees makes the inclusion of Baumgardner's in the unit a close question. Cf. *Kirlin's Inc. of Central Illinois*, 227 NLRB 1220 (1977). Nevertheless, the substantial differences in working conditions and hours, the lack of common supervision at the unit level, and the separate

identities of the two restaurants, both administrative-ly as a division within the corporate structure, and commercially as a distinct consumer product, establish that Clearwater has not been so effectively merged with Baumgardner's so as to have lost its individual identity. Thus, the Clearwater employees are an identifiable group with a separate and distinct community of interest.

Accordingly, the presumption of the appropriateness of a single-facility unit has not been overcome and a unit limited in scope to Clearwater is appropriate. We find, contrary to the Regional Director, that the following employees of the Employer constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All employees employed by Kapok Tree Inn Corporation including dishwashers, waitresses, hostesses, waiters, cleaning crew, kitchen preparation personnel, employed at its Kapok Tree Inn, Inc., Clearwater, Florida; but excluding unit managers, assistant manager, staff manager or dining room manager, waitress supervisor, hostess supervisor, cashier supervisor, assistant kitchen manager, gift shop manager, guards and supervisors as defined in the Act.

[Direction of Election and *Excelsior* footnote omitted from publication.]

Eschenbach-Boysa Management Company, Inc., Eschenbach-Boysa Management Company of Waukesha, Inc. and Hotel Employees and Restaurant Employees International Union, Local No. 122, AFL-CIO, Petitioner. Case 30-RC-4143

17 January 1984

DECISION ON REVIEW AND DIRECTION

BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND HUNTER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Hearing Officer Paul Bosanac of the National Labor Relations Board. Following the close of the hearing the Regional Director for Region 30 issued a decision. Thereafter, the Employer filed a request for review of the Regional Director's decision and brief in support thereof and the Petitioner filed briefs in support of the Regional Director's decision.

On 20 July 1982 the National Labor Relations Board by telegraphic order granted review as to the appropriateness of the unit.¹

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the hearing officer's rulings made at the hearing and finds that they are free from prejudicial error. They are affirmed. Additionally, the Board has reviewed the record in light of the request for review and briefs, and adopts the Regional Director's findings and recommendations.

The Employer consists of two franchise restaurants located respectively in Milwaukee and Waukesha, Wisconsin. The Petitioner seeks to represent the employees at the Milwaukee location. The Employer asserts that the appropriate unit should include both stores.

The Employer's restaurant in Milwaukee opened in July 1979 and the restaurant in Waukesha in March 1981. The restaurants are 20 miles apart and each employs about 25 employees. Each restaurant is a separate corporation. Lee Martin Eschenbach owns 50 percent of the stock in each corporation. Steve Boysa owns the remainder of the stock in the Waukesha restaurant and 34 percent of the stock in the Milwaukee location. Bill Heilen owns the remainder of the stock in the Milwaukee location. A central business office for the Employer is at a separate location in Milwaukee.

The two restaurants have identical menus, food prices, and hours of operation and are promoted through the same advertising. One workmen's compensation policy covers both locations and employees at both restaurants receive the same insurance and vacation benefits and the same 50-percent discount on food purchased prior to the employee's shift. Wage ranges are similar (\$2.01 to \$4.50 per hour at the Waukesha restaurant and \$2.01 to \$5 per hour at the Milwaukee restaurant) and employee classifications are identical except that Milwaukee has two quality control supervisors and Waukesha has none. Employees in the various classifications have the same duties, the same paydays, and the same probationary period. Seniority accrued at one location is honored at the other location. All personnel records are kept on the premises of the respective restaurants and each restaurant has a separate payroll and timecards.

Managerial responsibility is split between Eschenbach and the two managers employed at each store. In addition to spending 3 days a week at each store, Eschenbach calls the managers at the store where he is not present three to six times a day. Eschenbach makes the major managerial decisions concerning the restaurants such as setting menus and choosing vendors and also decides the number of people to be hired. Additionally, Eschenbach sets pay rates and overall terms and conditions of employment. Although the managers do most of the training of employees, when Eschenbach decided to alter the meatcutting technique at the restaurants, he personally taught the employees the new technique. Similarly, when a fruit bar was added to the salad bar, Eschenbach showed the employees how to set up and maintain it. Appeal to Eschenbach constitutes the third step of the grievance procedure, although employees do call him directly at home or at the other restaurant concerning their problems.

The managers solve employee problems and complaints and grant time off. The managers make up the employee work schedules although such schedules must be reviewed and approved by Eschenbach. Significantly, the managers interview job applicants and can and have hired employees on their own. They may discharge an employee for a severe violation of company policy such as intoxication or threatening violence but otherwise must obtain Eschenbach's approval before firing an employee. As to such terminations that require Eschenbach's approval, the managers make effective recommendations. Occasionally, the managers recommend employee promotions and raises but most often they are initiated and determined by Eschenbach based on his own observation. The managers

¹ The Board has been administratively advised that an election was conducted on 23 July 1982 in the unit found appropriate by the Regional Director and the ballots were impounded.

do much of the training of the employees, often using materials provided by the franchising company.

The managers determine the quantity of goods to order based on the previous week's volume. They can reject merchandise if it does not meet the specifications of the order. Once or twice a week, uniforms, small equipment, or food is transferred between the two restaurants to relieve temporary shortages.

There is evidence that the managers rotate between the two restaurants for training purposes and to cover vacations and time off. However, there is virtually no evidence of transfer of employees. There have been no permanent transfers and three temporary transfers since the second location was opened in March 1981. Two of these transfers were in order to assist in opening the new restaurant. The third transfer involved emergency help for one evening.

We agree with the Regional Director's conclusion that the two corporations are a single employer and as such the broader two restaurant unit could be an appropriate unit. However, as the Regional Director also finds, we conclude the Employer here has not rebutted the presumption of appropriateness attaching to the single restaurant unit. The restaurants here are 20 miles apart and there is virtually no interchange among their employees. Eschenbach does not make daily visits to both locations and therefore, although he reserves for himself many management prerogatives, he necessarily must leave many of the day-to-day decisions concerning the restaurants to his managers. These managers, *inter alia*, interview and hire employees, grant time off, and resolve employee problems and complaints. It thus appears that the employees at the Milwaukee restaurant have a separate community of interest. There is no history of bargaining in a broader unit. In view of all of the foregoing we find that the employees employed at the Milwaukee restaurant constitute a separate appropriate unit.²

DIRECTION

It is directed that the Regional Director for Region 30 shall, within 10 days from the date of

this Decision on Review and Direction, open and count the impounded ballots cast in the election held 23 July 1982, and thereafter prepare and serve on the parties a tally of ballots, on the basis of which he shall issue the appropriate certification.

MEMBER HUNTER, dissenting:

I cannot agree with my colleagues that a single restaurant unit here is an appropriate unit. In my view, the administration of the restaurant is so highly centralized in the person of Lee Martin Eschenbach that the single location unit presumption is rebutted.

It is clear from the record that Eschenbach is either present at or in touch with both restaurants every day. Eschenbach sets the terms and conditions of employment for both restaurants and they are virtually uniform throughout. To the extent that the managers exercise any autonomy, it concerns matters that are largely routine and is exercised consistent with preset guidelines. Although personnel records of the two establishments are kept separately as required by law, Eschenbach is a consistent and important factor in virtually all personnel actions with the possible exception of the initial hiring of employees. Thus, Eschenbach must be consulted about all scheduling and discharges (except in egregious cases), generally initiates all raises and promotions, and is frequently involved with problems and grievances even at their initial stages. Eschenbach often decides to transfer equipment and food between the two restaurants and has on several occasions transferred employees from one restaurant to the other. Indeed, one employee was transferred for a period of 6 months to a year when the second restaurant opened. Moreover, there is evidence that the managers rotate between the two restaurants to accommodate training needs, vacations, and time off.

In my view then, the employees at the Milwaukee restaurant simply do not have a separate community of interest in any meaningful way.¹ Since the Petitioner has agreed to go to an election in the larger unit if that is deemed the only appropriate one, I would direct an election in a unit consisting of the Employer's employees at its restaurants in both Milwaukee and Waukesha.

² *Big Y Foods*, 238 NLRB 860 (1978), relied on by our dissenting colleagues, varies from the facts in this case in several important respects, and therefore does not control our decision here. In *Big Y*, the local managers had no authority to mete out discipline on their own, except for occasional oral reprimands. They had authority to resolve only the most minor employee complaints without referring them to the employer's central officials. The local managers there were not involved in employee evaluation. In short, the managers here possess far more authority to control or affect labor relations policy than did the local managers in *Big Y*.

¹ See, for example, *Big Y Foods*, 238 NLRB 860 (1978), where the Board found a single location unit inappropriate. There interchange was also limited, but, as here, the local managers' autonomy was greatly circumscribed.

General Mills Restaurants, Inc., d/b/a Red Lobster and United Steelworkers of America, AFL-CIO-CLC. Cases 7-RC-18925 and 7-RC-18926

December 14, 1990

DECISION ON REVIEW AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND DEVANEY

On May 16, 1989, the Regional Director for Region 7 issued his Decision and Direction of Elections finding appropriate two single-location units of the Employer's restaurant employees located in Taylor and Dearborn Heights, Michigan. On May 30, 1989, the Employer filed with the Board a timely request for review, and Motion to Stay the Regional Director's Decision and Direction of Election. At the same time, the Employer filed a Motion to Stay Election, Motion to Reopen Record and Motion to Transfer Case to another Regional Office. On June 13, 1989, in a supplemental decision, the Regional Director affirmed his Decision and Direction of Elections. On June 16, 1989, the Board granted the Employer's request for review solely with respect to unit scope and the Employer's allegation that the transcribed record, as a result of the reporting service company's actions, was incomplete. The Board ordered that the elections be held but that the ballots be impounded and the cases remanded to the Regional Director to reopen the record for receipt of the omitted testimony. In all other respects, the request for review was denied, as were the Employer's motions. Pursuant to the Board's Order, the elections were conducted, the ballots were impounded, the record was reopened, and a July 11, 1989 hearing was held. On September 5, 1989, the Regional Director issued his Second Supplemental Decision and Order, upholding his original decision and ordering that the ballots be opened and counted. The Employer filed a timely request for review and supplemental brief in support. On December 28, 1989, the Board granted the Employer's request for review.

The National Labor Relations Board has delegated its authority in this matter to a three-member panel.

The Board has reviewed the record in light of the requests for review and supporting briefs and has decided to affirm the Regional Director's findings and conclusions as modified. In agreement with the Regional Director, we conclude that the evidence presented by the Employer fails to overcome the presumption that the requested single-location units are appropriate. In support of this conclusion, we find that the general managers of the two restaurants in question retain a meaningful amount of autonomy and that the evidence concerning employee interchange is not sufficient to require broader units than those requested.

Facts

The Employer, which does business under the name Red Lobster, operates 13 restaurants in the Detroit, Michigan area. The Union has sought to represent employees in separate units at two area locations: Taylor and Dearborn Heights. As noted, the Regional Director found appropriate the two single-location units requested by the Union, rejecting the Employer's primary contention that the smallest appropriate unit must encompass all 13 restaurants in the Detroit area.¹

Pursuant to the Employer's current organizational structure, each of the Employer's Detroit restaurants has a general manager, who is assisted by a dining room manager and either an assistant or an associate manager.² The general manager reports to one of three area supervisors, each of whom has primary responsibility for four or five of the Detroit restaurants. In turn, the area supervisors report to a director of operations, whose responsibility covers 24 Red Lobster restaurants in Michigan, as well as 4 in Indiana.³

The Taylor restaurant employs approximately 100 employees and the Dearborn Heights restaurant employs approximately 85. There are a total of about 1200 employees in the 13 Detroit restaurants. The average distance between restaurants is about 7 miles, and all are located within a radius of approximately 22 miles.

There is no history of collective bargaining with respect to the employees in any of the various units asserted as being appropriate.

The Employer's personnel policies and procedures are centralized. Policies regarding wages, hours, overtime, vacations, holidays, retirement, profit sharing and employee fringe benefits are centrally established and uniformly applied at all the Red Lobster restaurants.

Within the individual restaurants, general managers are present a maximum of 5 days each week. Area supervisors are present in each of the restaurants on average about once each week, typically for the full day.⁴ When not present, the area supervisor maintains daily telephonic communication with each of the restaurants to which he is assigned. As explained below, both the

¹ The Regional Director also found no merit to the Employer's alternative claims that the smallest appropriate unit should consist either of employees at the four restaurants under the control of Area Supervisor David Shanks (also including Ann Arbor and Novi, Michigan locations), or a combined unit of the Taylor and Dearborn Heights employees.

² The record does not clearly set out the functional distinction between an assistant and an associate manager.

³ These 28 restaurants are segmented in three geographic territories, one of which is named the Detroit ADI (area of dominant influence), encompassing the 13 restaurants in question.

⁴ Even assuming that area supervisors are scheduled to be in restaurants on the general managers' days off, there is insufficient staffing for persons in these two positions to be present in all restaurants at all times. The record further indicates that the area supervisor and the general manager may be present simultaneously in a given restaurant. Thus it appears that on some days the most responsible person in the restaurant is either the assistant or the associate manager.

general manager and the area supervisor are responsible for the operation of the individual restaurant.

With respect to employee relations, the evidence shows that most of the hiring at the Taylor and Dearborn Heights restaurants is done by the general manager, without the area supervisor's involvement.⁵ It appears that the area supervisor controls only the size of the employee complement at each restaurant and determines whether an applicant may be hired at an hourly rate above \$5.⁶

General managers also evaluate employees, using a form prepared by the Employer. Although these evaluations may be completed without the prior knowledge of or approval by the area supervisor,⁷ there are certain restrictions placed on the general manager in completing these evaluations. First, there is uniform testimony that unsatisfactory evaluations need the prior approval of the area supervisor.⁸ Second, the area supervisor also becomes involved if an employee complains about the evaluation he received.

The evidence further indicates that the general managers initiate wage increases for employees, but that the area supervisor's approval is required for all wage increases. The record provides only general evidence that it is more difficult to secure an area manager's approval for increases of more than 50 cents per hour; however, the frequency with which wage increases under 50 cents an hour are denied is unclear. Area supervisors also must approve any wage rates over \$7.50 per hour.

Although the area supervisor determines the number of employees who are to work in each restaurant,⁹ the general manager is responsible for the details of employee scheduling.¹⁰ He has authority to call in and release employees as needed, and approves overtime pursuant to set guidelines. Further, he approves vacation requests and grants leaves of absence of up to 7 days. He initials timecards and distributes paychecks.

In regard to employee discipline, the general managers can administer verbal discipline, which is memorialized in the employee's personnel record without

prior approval. General managers can also issue written discipline and have authority to discipline employees for attendance problems without prior approval. Other forms of written discipline, including general manager's recommendations that an employee be discharged, require the prior approval of the area manager, who conducts an independent investigation. Discharge recommendations are followed approximately 50 percent of the time.

There are meetings of employees in the restaurants which are scheduled by the general manager, sometimes at the direction of the area supervisor. The evidence indicates that employees' concerns, characterized as grievances, are expressed and responded to at these meetings. If the area supervisor is present, he or the general manager may respond to these concerns. The evidence is clear that the general manager may resolve grievances that do not implicate general corporate policy, whether presented at these meetings or at other times. Specifically, the evidence indicates that the general managers have authority to correct payroll problems.

The evidence indicates that there was a certain degree of employee interchange involving the 85 Dearborn Heights employees and the 100 Taylor employees. During 1988, 11 employees were permanently transferred into or out of these two restaurants. The testimony indicates that permanent transfers were generally at the employee's request. During this period, there were also 11 instances in which Dearborn Heights employees were temporarily assigned work in another restaurant, and 16 times when employees from other restaurants were assigned work at the Dearborn Heights location.¹¹ During 1988, only two Taylor employees were temporarily assigned work at other locations. All of these temporary assignments were voluntary, and about half of them were of very limited duration.¹²

The Regional Director

As observed above, the hearing in this case was opened in order to record the full testimony of one witness, Area Supervisor Norris, whose testimony was not fully recorded at the initial hearing. The Regional Director found that Norris' testimony at the second hearing contradicted what Norris stated at the first hearing¹³ concerning the general manager's authority to handle grievances, grant pay raises, and administer discipline. The Regional Director also found that the

⁵ Of the 40 employees hired in the 6 months before the hearing, the area supervisor had no involvement in the hiring of at least 28 of these employees. Evidence of the area supervisor's involvement in interviewing and hiring a portion of the applicants is consistent with, and may be explained by, his presence in the restaurants during days the general manager was not there.

⁶ The determination whether to rehire a former Red Lobster employee is not controlled by the general manager, but is subject to prior approval by the area supervisor.

⁷ The area supervisor reads and signs evaluations, sometimes after they are given to the employee.

⁸ Area Supervisor Norris testified that the area supervisor also must approve in advance all evaluations that are also above satisfactory. Norris' testimony was not, however, corroborated by Area Supervisor Shanks who has responsibility for the two restaurants covered by the petitions.

⁹ The area supervisor's involvement in setting employment levels and in wage determinations is directly connected to his responsibility for maintaining a budget for restaurants under his authority.

¹⁰ If there is a question whether an employee being trained is ready to be scheduled for a certain position, the details will be discussed with the area supervisor.

¹¹ Several employees were temporarily assigned to another restaurant on more than one occasion, so that, in total, 19 employees were involved in the Dearborn Heights temporary transfers.

¹² In half of the instances, earnings from the temporary assignment were less than \$21, indicating that the employee worked only a few hours at the other location.

¹³ The Regional Director noted that no claim was made that the testimony from the first hearing was defective insofar as it was recorded.

testimony of two other area supervisors differed from that of Norris. In making his unit determinations, the Regional Director declined to rely on Norris' testimony to the extent that it was internally conflicting.

In reaffirming his initial finding that the petitioned-for units were appropriate, the Regional Director relied on the testimony of Area Supervisors Grierson and Shanks and on Norris' testimony on matters about which Norris did not contradict himself. The Regional Director found that this evidence established that the general managers possessed significant autonomy in the day-to-day operations of their individual restaurants. In reaching this conclusion, he found that general managers possessed the authority to hire new employees, gave verbal warnings which were documented in employees' personnel files, prepared evaluations, effectively recommended discharge, and granted employees wage increases. He further found that the general managers called in and released employees, reassigned them within the restaurant, granted time off and leaves of absence, and scheduled vacations, conducted employee meetings, and resolved grievances, including payroll problems. In addition he found that they were in charge of the day-to-day operations of the restaurant.

The Regional Director also found that the degree of employee interchange did not compel a multilocation unit. He found that the number of permanent transfers was relatively small compared to the size of the work force in the petitioned-for restaurants, and that the extent of temporary transfers was also not so substantial as to negate the appropriateness of the separate units.

The Employer's Request for Review

Employer requested review on two general grounds: that the Regional Director misconstrued the factual evidence, resulting in erroneous conclusions, and that the Regional Director made errors of law. The Employer also alleges bias and prejudice.¹⁴

The Employer argues that the restaurants are not autonomous and that the Regional Director ignored certain limitations on the authority of the general managers. The Employer asserts that general managers do not effectively recommend discharge, and that the amount of hiring they do is set by area supervisors. Area supervisors approve about 35 percent of those actually employed, according to the Employer, relying on Norris' testimony. All evaluations done by general managers must eventually be approved by the area supervisor. General managers cannot give an evaluation of "above satisfactory" or "needs improvement" without prior approval from the area supervisor. Vacations granted and grievances resolved by the general managers are routine and do not require the exercise of independent judgment. General managers have no authority to change wages. Because of these limits on the autonomy of the individual stores, the Employer argues that individual units are inappropriate.

The Employer claims that the Regional Director erred in not considering all of Norris' testimony at the second hearing. The Employer asserts that Norris' testimony is not contradictory and that the Regional Director did not pay adequate attention to those aspects of the testimony in the second hearing that were not found to be contradictory.

The Employer argues that the Regional Director's legal analysis is defective. The Employer acknowledges the single-unit presumption, but, citing *Gray Drug Stores*, 197 NLRB 924 (1972), contends that this is a "weakened" presumption whenever the single facility is part of a retail chain. The Employer also argues that, in determining whether the evidence shows a merger of the single-store work force into the more comprehensive grouping so as to rebut the presumption, the Board need not find that the separate identity of the single store has been "completely submerged." The Employer implies that the Regional Director applied too strict a test in deciding whether it had rebutted the presumption in this respect.

Discussion

The Board in *Kapok Tree Inn*, 232 NLRB 702, 703 (1977), succinctly stated its approach in determining appropriate units in multifacility operations such as the one we have before us:

When dealing with a multifacility operation, the well-established Board policy is to find a single-facility unit presumptively appropriate. This presumption can be overcome, however, by a showing of functional integration so substantial as to negate the separate identity of the single-facility unit. In making determinations on this issue, the Board looks to such factors as prior bargaining history, the geographical proximity to other facilities of the same employer, the degree of day-to-day managerial responsibility exercised by the branch facility management, the frequency of employee interchange, and whether the requested single-facility unit constitutes a homogeneous, identifiable, and distinct employee grouping. *Haag Drug Company, Incorporated*, 169 NLRB 877 (1968).

As explained below, we conclude that the evidence presented by the Employer is insufficient to overcome

¹⁴ We have carefully examined the record and find no basis for finding bias or prejudice on the part of the Regional Director. Even assuming arguendo that we did so find, this would not affect the outcome of this case because we have made an independent review of the record.

the presumptive appropriateness of a single-facility unit.¹⁵

The separate Red Lobster restaurants in the Detroit area are not physically proximate to each other, nor are they functionally integrated. None of the restaurants in question has any collective-bargaining history, and the identity of the employees as a separate grouping at each restaurant is apparent, particularly in that hiring is done locally at each restaurant. Further, we find that the degree of employee interchange is minimal, and the significance of that interchange is diminished because the interchange occurs largely as a matter of employee convenience, i.e., it is voluntary. Temporary transfers in this case consist of employees working some hours during the week in a store other than the one to which they are assigned. Even in the Dearborn Heights restaurant, where the degree of temporary interchange is most extensive, only 19 employees out of a work force of 85 employees were affected by a temporary work assignment during 1988, usually for very short periods of time.¹⁶ Permanent transfers, a less significant indication of actual interchange than temporary transfers, were similarly minimal, with 11 permanent transfers in a combined work force of 185 employees within a 1-year period. Thus, the evidence is insufficient to support the Employer's claim that the separate units at the two petitioned-for restaurants is inappropriate.

The sole remaining factor having an impact on the scope of the appropriate unit is the degree of local autonomy of the general managers at the Dearborn Heights and Taylor facilities. As explained below, we agree with the Regional Director's conclusion that general managers retain sufficient authority to support the presumption in favor of single-facility units.

Although it is clear that the general managers have limitations on their authority, some imposed by corporate policy and some based on their relationship to the area supervisor, we find that the general managers are responsible for the day-to-day management of the restaurants. In the petitioned-for restaurants, the gen-

eral managers are the persons who make the overwhelming majority of the hiring decisions, accepting applications for employment and conducting interviews of the applicants. Further, they are responsible for evaluating employees, with approval necessary only for those rated less than satisfactory. Their initiation of wage raises, another clear area of their authority, has not been shown to require anything more than routine approval by the area supervisors, at least for raises of less than 50 cents an hour. General managers also address grievances and resolve them within the Employer's existing policies. Their role in the discipline of employees includes issuing written warnings to employees for attendance matters and oral warnings for all matters. Such warnings are then recorded in the employee's personnel file retained at the restaurant. Although we agree with the Employer that the evidence does not support the Regional Director's finding that general managers make effective recommendations on discharge (given that an independent investigation is conducted by the area supervisor with general manager's recommendation being accepted only half of the time), it remains that the general manager plays an active role in disciplining employees. Finally, the general manager is responsible for the day-to-day staffing of the restaurant, calling in and releasing employees, granting overtime, reassigning employees, and granting vacations and leaves of absence. Although the evidence shows that the area supervisor is involved in restaurant operations, the record does not clearly distinguish between the function of the area supervisor as a substitute for the general manager (i.e., when only the area supervisor is present in the restaurant), and his function as the superior of the general manager (i.e., when both are present or when the general manager may not act alone). To the extent that the record is ambiguous in this regard, we find that it detracts from the Employer's effort to overcome the single-facility presumption.

We emphasize that the foregoing recitation of the facts is based primarily on the testimony of Area Supervisor David Shanks, who, as the area supervisor responsible for the Dearborn Heights and Taylor restaurants,¹⁷ had firsthand knowledge of the petitioned-for units. While the testimony of other witnesses is not wholly irrelevant, the testimony of the other area supervisors does little to advance the Employer's conten-

¹⁵The Employer misconstrues *Grey Drug Stores*, supra, in contending that the single-unit presumption is weaker in cases involving retail chains than it is where other types of facilities are concerned. The Board in *Grey Drug* cited the same factors for rebutting the presumption that it uses in any multifacility case. 197 NLRB at 925. The Board's special rule for retail chains—that the bargaining unit “should embrace all stores within the employer’s geographic or administrative area”—was applied only after it determined that the single-unit presumption had been rebutted. *Ibid.* The Board then confronted the issue whether the unit should consist of all stores in the State of Florida, all stores in two contiguous counties which were under the supervision of managers who supervised no other stores in the State, or all stores in one of those two counties. The Board selected the two-county unit, applying the retail chain policy that comes into play after the single-unit presumption has been rebutted. *Id.* at 926.

¹⁶Because the evidence does not take into account employee turnover, the record does not accurately show how many different individuals were employed at the Dearborn Heights facility during 1988. It appears, however, that the proportion of all such employees affected by temporary assignments when turnover is considered was substantially less than 20 percent of those employed during this period.

¹⁷The record contains reference to a change shortly before the first hearing that one of the restaurants usually under Shanks' authority, Dearborn Heights, was being overseen by a person who, until recently, had been the director of operations in Kentucky and Tennessee. In addition, at some point in time between the two hearings, the Dearborn Heights restaurant was assigned to Area Supervisor Joseph Gernson. The record does not indicate that those changes had any impact on the authority of the general managers in these restaurants.

tion that uniform management practices were followed throughout the restaurants in the Detroit ADL.¹⁸

We find no merit in the Employer's contention that the Regional Director misapplied legal precedent. Despite the transfers and the centralized administration of the Employer's restaurants, we find that the single-facility units at Dearborn and Taylor are appropriate. As in *Big Y Foods v. NLRB*, 651 F.2d 40 (1st Cir. 1981), affg. 251 NLRB 869 (1980), it appears that only a small number of employees were involved in transfers. This distinguishes the case at hand from *White Castle System*, 264 NLRB 267 (1982), in which the Board dismissed the election petition. In that case 200 employees were involved in temporary transfers out of a total group of 350-400 employees.

Furthermore, as outlined above, employees at the restaurants in question "perform their day-to-day work under the immediate supervision of one who is involved in rating their performance and affecting their job status and who is personally involved with the daily matters which make up their grievances and routine problems." *Penn. Color, Inc.*, 249 NLRB 1117, 1119 (1980). Finally, there is no bargaining history of, nor any request for, representation on a broader basis. See *Renzetti's Market*, 238 NLRB 174, 176 (1978).

The Employer states that area supervisors have a high degree of involvement and contact with the restaurants and that therefore the general store managers do not have independent authority. In support, the Employer cites *Pic-Way Shoe Mart*, 274 NLRB 902 (1985); *Petrie Stores Corp.*, 266 NLRB 75 (1983); and *Super X Drugs of Illinois*, 233 NLRB 1114 (1977). These cases are distinguishable, however, in that, unlike here, the record in each showed that the local manager did not make the final decision on hiring employees. The Employer also relies on *Point Pleasant Foodland*, 269 NLRB 353 (1984), and *Kirlin's Inc.*, 227 NLRB 1220 (1977). In *Point Pleasant*, the Employer's president had final authority in all personnel matters, including hiring. In *Kirlin's*, the store managers could not do more than recommend job applicants.

In a related contention, the Employer cites *V.I.M. Jeans*, 271 NLRB 1408, 1409 (1984), *White Castle*,

supra, and *Lawson Milk Co.*, 213 NLRB 360 (1974), for the proposition that the Regional Director did not take proper account of evidence showing that the general managers' hiring authority was severely circumscribed by dictates from above, e.g., by constraints on the number of employees whom they could hire. We find the argument unpersuasive and the cases distinguishable. It is unlikely that a manager of a single facility in any multifacility operation would be free of all restraints on staffing levels. The significant point here is that the managers of the restaurants at issue possess hiring authority and that they make the majority of decisions concerning whom to hire. In *V.I.M. Jeans*, by contrast, the local manager conferred daily with the central management official, who reviewed all hiring and firing decisions. *Id.* at 1409. Similarly, in *White Castle*, *supra*, 264 NLRB at 268, all of the local manager's hiring decisions were subject to the approval of district supervisors, who visited the premises daily. Finally, the Board analyzed the circumscriptions on a manager's authority in *Lawson Milk Co.* in the context of determining whether a four-store unit that was "neither an administrative subdivision nor a distinct geographical grouping of stores" was an appropriate unit. *Id.* at 360-361. This analysis followed from the Board's determination, pursuant to the traditional test, that the single-facility presumption had been rebutted. See footnote 15, *supra*.

In sum, we find, contrary to the Employer's contentions, that the Regional Director's unit finding is consistent with Board precedent concerning the appropriateness of single-facility units, including such units in retail store chains.

We therefore find the following units appropriate for collective bargaining:

All full-time and regular part-time employees employed by the Employer at its Store No. 123 at 8787 Telegraph Road, Taylor, Michigan, including hostess/host, bus persons, servers, utility employees, bartenders, cashiers, production employees and line employees; but excluding all managers, guards and supervisors as defined in the Act. All full-time and regular part-time employees employed at its Store No. 124 facility at 6850 N. Telegraph Road, Dearborn Heights, Michigan, including hostess/host, bus persons, servers, utility employees, bartenders, cashiers production employees and line employees; but excluding all managers, guards and supervisors as defined in the Act.

Accordingly we shall remand the case to the Regional Director with directions to open and count the impounded ballots, to issue tallies of ballots, and to take further appropriate action.

¹⁸ For example, Area Supervisor Joseph Gnerson testified that he handles all "need improvement" evaluations. He also testified that he sometimes initiates pay raises. This might indicate that the practice in Gnerson's area varies from that of Michael Norms' area. Norms testified that he approves all pay raises. Norms also testified that he approves all evaluations that are either above or below satisfactory; but Area Supervisor Shanks only required prior approval of below-satisfactory evaluations. Norms himself admitted that the entry level wage rate is set by each individual area supervisor, and that his rate might vary from that set by David Shanks or Joseph Gnerson.

Because we find that, by virtue of his position, David Shanks provided the most probative testimony on the issue of the autonomy of the two petitioned-for restaurants we need not pass on the Employer's attack on the Regional Director's treatment of internal conflicts he perceived in Norms' testimony in the two hearings. Thus, it is also irrelevant whether that treatment could be characterized as a credibility finding.

ORDER

It is ordered that this case be remanded to the Regional Director for Region 7 to open and count the ballots cast in the elections conducted in this proceeding on June 16, 1989, to issue tallies of the ballots thereon, and to take further appropriate action.

Executive Resources Associates, Inc. and Miscellaneous Warehousemen, Drivers and Helpers Local 986, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, Petitioner. Case 31-RC-6335

January 29, 1991

DECISION ON REVIEW AND ORDER REMANDING

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND DEVANEY

On August 12, 1988,¹ the Acting Regional Director for Region 31 issued a Decision and Direction of Election in which he found the petitioned-for unit to be an appropriate unit² and directed an election.³

On August 26, the Employer filed a timely request for review, on the grounds that the decision departed from precedent. The Employer contended that the only appropriate unit consisted of certain employees covered by both of the Employer's contracts in effect at the Naval Weapons Center at China Lake, California.

By telegraphic order dated September 8, the Board granted the request for review.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the entire record in light of the request for review and supporting brief, and has decided to affirm the Acting Regional Director's rulings, findings, and conclusions, as modified below.

Facts

The Employer, with headquarters in Arlington, Virginia, provides technical support services throughout the country to various government and commercial entities. Two separate contracts covering such services are in effect at the Naval Weapons Center at China Lake in California: the "Echo Range" contract and the "Range Support Services" contract.

The Petitioner seeks to represent a unit consisting of approximately 48 employees covered by the Employer's Echo Range contract. The Employer contends that the only appropriate unit must include its employees working under both its Echo Range and Range Support Services contracts.

The Range Support Services contract has been in existence since September 1986, the Echo Range contract since March 1988. Both contracts are for 5 years. Employees under both contracts maintain and operate equipment in support of flight operations at China Lake. Equipment differs and is not interchanged because the Range Support Services employees handle the conventional weapons delivery range and the Echo Range employees cover primarily an electronics warfare range.⁴

The employees covered by the two contracts have similar educational backgrounds, i.e., high school diplomas and military or trade school training in electronics or electromechanical work. The same personnel policies and same benefits apply to employees covered by both contracts.⁵ Payrolls for these and all its other contracts are handled at the Virginia headquarters. The salary range at Echo Range is \$20,000-\$38,000 and at Range Support Services is \$11,000-\$29,000. Echo Range employees work 10-hour days, 4 days a week; Range Support Services employees work 8-hour days, 5 days a week.

There are separate program managers for Echo Range and Range Support Services. They exercise immediate supervision over their respective ranges and report to the same executive director. That executive director's office is in Virginia; he is also responsible for eight other contracts at five other locations in the country.⁶ The program manager for the Echo Range contract works from a trailer on the Echo Range. The program manager for the Range Support Services contract works from the main base of the Naval Weapons Center, which is approximately 35 miles from the control point for Echo Range.

The respective program managers interview employee applicants and submit recommendations to the executive director.⁷ If the forms are in order and the applicants meet the requisite qualifications, the executive director authorizes the respective program manager to release an "offer." The program managers recommend pay raises, bonuses, and discipline, and they complete performance reviews for their respective employees. The record shows that the executive director exercises approval authority on these matters. However, the record offers no indication of how often the executive director refuses to go along with the recommendations of the respective program managers or how the executive director might go about exercising any independent review. At most, the record shows that the executive director talks with the respective

¹ All dates are 1988 unless otherwise specified.

² The Acting Regional Director described the appropriate unit as follows:

All employees employed by the Employer under the Echo Range contract including, but not limited to, Instrumentation Technicians A, Instrumentation Technicians B, Instrumentation Technicians C, Electronic Technicians A, Electronic Technicians B, Electronic Technicians C, Digital Engineers and Radar Engineers but excluding office clerical employees, professional employees, administrative assistant, program manager, program coordinator, guards and supervisors as defined in the Act.

No issue concerning unit composition is before the Board now.

³ The election was held September 8, 1988, in the unit found appropriate by the Acting Regional Director. The ballots were impounded.

⁴ A "range" is a large geographical area with controlled airspace.

⁵ This uniformity in personnel policies and benefits applies nationwide to all of the Employer's employees.

⁶ The Employer has four operating centers, each of which has an executive director.

⁷ Initial interviews at Echo Range were conducted by the Range Support Service's program manager because the program manager for Echo Range had not yet been hired.

program managers daily and that either he or a vice president visits the respective sites once a month.

Employees covered by one of the two contracts involved here would not be directly affected by the cancellation or reduction in the other contract; there are no "bumping" rights from one contract to the other. There have been two transfers from Range Support Services to "non-unit" Echo Range jobs and one recent temporary transfer. Otherwise, the record reveals no other interchange or interaction by the employees covered by the respective contracts.⁸ Indeed, while employees may perform work on the same naval test mission at China Lake, the Range Support Services program manager testified that "our people would not work, would not coordinate with the Echo people. But the government would do the coordination and assign us our positions."

Discussion

In finding that certain employees covered by the Echo Range contract constitute an appropriate unit, the Acting Regional Director concluded that the evidence was not sufficient to rebut the single "plant" presumption favoring the petitioned-for Echo Range contract unit. He relied on the lack of significant interchange or interaction among the employees in the two contract groups, noting that they work on different equipment under two separate service contracts with different expiration dates. He also relied on an absence of any bargaining history concerning the employees and the fact that no labor organization seeks to represent the employees on a broader basis. In addition, he relied on evidence that employees in the requested unit perform their day-to-day work under the immediate supervision of their contract's program manager, who rates their performance and affects their job status and pay through his recommendations, and that the record fails to disclose the extent to which the executive director follows the program manager's recommendations concerning such matters.

In its brief in support of the request for review, the Employer challenges the Acting Regional Director's application of the single plant presumption to the government services contract here. Instead the Employer contends that the Acting Regional Director should have applied a community-of-interest analysis.

It has been a longstanding rule that the Act does not require that the bargaining unit approved by the Board be the only appropriate unit, or even the most appropriate unit; it is only required that the unit be an appropriate unit.⁹ Even putting aside the presumption re-

lied on by the Acting Regional Director, we are satisfied that the petitioned-for unit of employees covered by the Echo Range contract is an appropriate unit.

We note that certain considerations relied on by the Acting Regional Director in making the unit determination are relevant under either the presumption he applied or the community-of-interest analysis urged by the Employer. For example, the lack of significant employee interchange between the two groups of contract employees is a strong indicator that the Echo Range employees enjoy a separate community of interest.¹⁰ Similarly, despite being commonly located at the China Lake complex, the record fails to show that the two groups of employees work in close geographic proximity or that they come in frequent contact with each other. The Range Support Services contract employees work primarily from the main base of the Naval Weapons Center, which is 35 miles from the Echo Range control point; and although some of them may at times work on the Echo Range, they do not work with the Echo Range contract employees. Likewise, while on occasion certain Echo Range employees may go to the main base or the lab, and some work at sites located up to 20 miles from the Echo Range control site, there is no evidence of interaction between the Echo Range and Range Support Services employees while at work. To the contrary, the testimony of the Range Support Services program manager establishes that "our people" do not coordinate with the Echo Range employees.

The finding of a separate community of interest for the Echo Range employees is also supported by the fact that the service contract under which they work expires approximately 1-1/2 years after the Range Support Services contract terminates. This significant time difference gives rise to potentially divisive representational and bargaining concerns that not only demonstrate a separate community of interest for the Echo Range employees but might even suggest that those employees could not share a collective community of interest with their Range Support Services counterparts. To begin with, the earlier termination of the Range Support Services contract would bring about a sizable reduction in a unit consisting of the two groups of China Lake employees early on in the bargaining relationship with the Employer. More importantly, both before and at the outset of the establishment of any such relationship, the wide difference in the contracts' expirations could put the Echo Range employees at cross-purposes with the Range Support Services employees concerning the bargaining demands the two groups of employees would want to make on the Em-

⁸The record indicates that Echo Range employees may go to the main base to pick up equipment or to go to the lab and that Range Support Services employees could perform work in the Echo Range area.

⁹*Friendly Ice Cream Corp. v. NLRB*, 705 F.2d 570 (1st Cir. 1983); *NLRB v. J. C. Penney Co.*, 620 F.2d 718, 719 (9th Cir. 1980); *Morand Bros. Beverage Co.*, 91 NLRB 409, 418 (1950), *encl.* 190 F.2d 576 (7th Cir. 1951).

¹⁰As the court stated in *Spring City Knitting Co. v. NLRB*, 647 F.2d 1011, 1015 (9th Cir. 1981): "The frequency of employee interchange is a crucial factor in determining whether employees who work in different [groups] share a 'community of interest' sufficient to justify their inclusion in a single bargaining unit."

ployer or which ones should be given priority or insisted on at the expense of others. For example, conflict between the two employee groups could develop over the duration of the collective-bargaining agreement and the desirability of having overall unit seniority and "bumping" rights; and severance pay could be more important as a term and condition of employment to the Range Support Services employees facing earlier contract and job termination than other fringe benefits that might be of more immediate concern to the Echo Range employees. In addition, although not highlighted by the Acting Regional Director in his decision, there are substantial differences in wages between the two employee groups that would likely add to this potential for disagreement in bargaining aims. In particular, the \$9000 differential in bottom and top salary levels favoring the Echo Range employees could become a prime source of friction, with the Range Support Services employees wanting pay parity and the Echo Range employees wanting pay increases for themselves.

Finally, an important factor demonstrating that the employees covered by the Echo Range contract enjoy a separate community of interest is that they perform their day-to-day work under the immediate supervision of the contract's program manager. It is he who rates their performance and it is he who makes recommendations affecting their pay and job status and tenure. In this regard, the executive director overseeing the China Lake contracts testified that a separate project manager for the Echo Range is required to provide onsite technical guidance and supervision because of the large number of employees covered by the Echo Range contract. Although the executive director has to approve all hiring and personnel actions recommended by this and all other program managers reporting to him and in general has final authority over labor relations matters concerning the contract groups for which he is responsible, the record is silent on the extent to which he does or does not rely on the program managers' recommendations or how often and under what circumstances he rejects them. Although the executive director has corporate documents that were filled out by the program managers to aid his review of their recommendations, and in some instances consults with them concerning the recommendations, the record does not indicate whether approval of those recommendations is routinely given by him if the documents are in order or, if not, what steps or methods are then taken by him to conduct an independent investigation to determine the merits of the recommended actions. Nor does the fact that the executive director talks daily with the respective program managers under his control, including the program managers for each of the China Lake contracts, overcome this evidentiary void. Because the executive director works out of the Arlington, Virginia office, and because he has to oversee

10 contracts at 7 different locations, it would appear that of necessity he must rely substantially on the recommendations of the program managers reporting to him.¹¹ Consequently, we find it reasonable to infer that the program managers have significant input into matters involving the employment status of the employees under their immediate supervision.¹²

In light of the foregoing factors demonstrating a separate community of interest among the Echo Range employees, and the absence of any bargaining history at the Employer's China Lake operations or a labor organization seeking a broader unit there, the Employer's centralized administrative control and uniform employee benefits and personnel policies are insufficient to establish that a merger of employment interests of the Echo Range employees with the Range Support Services employees has occurred so as to require finding that the former employees have lost their separate community of interest. Although centralized administration and common benefits and personnel policies may well support a finding that a broader unit, if sought, also would be an appropriate unit, it is up to the Employer to establish that the petitioned-for narrower unit is inappropriate. *NLRB v. Living & Learning Centers*, supra at 213; *Omni International Hotel*, 283 NLRB 475, 476 (1987). This the Employer has not done for the reasons explained above.

We find no merit in the Employer's reliance on *New England Telephone Co.*, 280 NLRB 162 (1986), to support its contention that a systemwide or multi-facility unit is the appropriate unit in service-oriented industries. The Board's holding in that case that a systemwide unit is optimal in the public utility industry rested largely on the high degree of interdependence of the various segments of a public utility. No such interdependence has been shown here.¹³ Indeed, the evi-

¹¹ See *Eichenkrantz-Burns Co.*, 268 NLRB 550, 551 (1984). That he or the executive vice president may once a month visit each contract site does not invalidate this conclusion.

¹² To the extent questions exist concerning the effectiveness of the program managers' recommendations, we resolve any ambiguity in the record against the Employer, who had the burden of producing evidence that would enable us to determine this issue. Moreover, there is no absolute rule that a single plant unit cannot be appropriate unless the manager of that unit has the authority to decide collective-bargaining issues. As the First Circuit stated in *NLRB v. Living & Learning Centers*, 652 F.2d 209, 215 (1981): "To lay down such an absolute rule would enable an employer, by centralizing all matters of labor policy, to prevent the NLRB from selecting as appropriate a unit of smaller dimensions than the employer's whole enterprise even though that smaller unit was the one which in light of all relevant factors the NLRB determined would be appropriate under § 9(b) 'in order to assure to employees the fullest freedom in exercising the rights guaranteed' by the Act."

¹³ We also find no merit in the Employer's reliance on *NCR Corp.*, 236 NLRB 215 (1978), in which the Board dismissed the petition after finding a branch unit to be inappropriate. There, the Board relied, inter alia, on the integrated operation of the branch offices, the frequent interchange of employees, and the fact that employee functions and terms and conditions are identical. As described above, none of these factors are present here.

The Employer's reliance on *Ohio State Legal Assn.*, 239 NLRB 594 (1978), is similarly misplaced. There the petitioner sought to represent the professional and nonprofessional employees in all the employer's offices. The employer contended, inter alia, that the only appropriate unit was one limited to the employer's individual offices. The Board found the petitioned-for employerwide

dence indicates that the Echo Range and Range Support Services contracts do not constitute a separate administrative or operational grouping of the Employer. As these two contracts are but 2 of the 10 administered by the executive director involved in this case, did the two contract groups at China Lake do not work together, notwithstanding that they may perform work on the same naval mission at that site.

In sum we find that under either the presumption relied on by the Acting Regional Director or under a community-of-interest analysis, the record here shows

unit to be an appropriate one. In so finding it did not have to decide whether a unit limited to an individual office also might have been an appropriate unit.

that the petitioned-for unit of Echo Range employees constitutes a unit appropriate for the purposes of collective bargaining. We, therefore, affirm the Acting Regional Director's unit determination and remand this proceeding to the Regional Director for Region 31 for further appropriate action.

ORDER

The Board orders this case be remanded to the Regional Director for Region 31 for the purpose of opening and counting the ballots impounded after the election held on September 8, 1988, and for further appropriate action.



Gould Board's Proposed One-Mile Rule: Judgement by Odometer

For many years, the National Labor Relations Board has presumed that employees at one facility should vote separately from employees at other facilities of the same company on whether to be represented by a union. Yet, with the prevalence of fax machines, modems, beepers, cellular phones, and voice mail, the importance of geography has diminished. It is not uncommon for an employee to have a closer working relationship with an employee who works a continent away than with one who works two doors down in the same building. Rather than questioning the continued relevance of this rule, the Board under the leadership of William B. Gould IV, on September 28, 1995, proposed turning the presumption into a *conclusive determination* unless the employees are physically located within one mile of another facility.

Determining Who Votes on Union Representation When a union seeks to organize a workforce, one of the most critical issues the NLRB must resolve is which group of employees will vote on whether to be represented by the union. If the union wins the election, this group of employees will become the "bargaining unit." This issue is generally resolved by determining which employees share a "community of interest" in their employment situation. This decision determines for whom the union will speak and which employees will be bound by the terms of the collective bargaining agreement. The NLRB has historically avoided mechanical rules for determining bargaining units and instead has approached the issue on a case-by-case basis because, as the Kennedy Board noted in 1962, "if the unit determination fails to relate to the factual situation with which the parties must deal, efficient and stable collective bargaining is undermined rather than fostered."

Union Preference—Small Units Unions generally prefer to organize smaller units in order to establish a beachhead from which to ultimately draw more employees into the union. Employers generally prefer maintaining the uniformity of compensation schemes, benefits, seniority systems and other personnel policies throughout the company.

When Employees are Geographically Separate When employees work in facilities that are separated by some geographic distance, the NLRB has assumed that the distance factor alone decreases the likelihood of a community of interest. Thus, the NLRB historically has presumed that employees at a single facility form a separate unit, but the presumption can be rebutted on a case-by-case basis by such factors as: centralized control over operations and personnel relations by the employer with little autonomy at each facility; similarity of skills and working conditions among the facilities; significant employee interchange between facilities; and the distance between the locations.

Gould Board Proposal The proposed rule would automatically establish that employees at a single location would be the bargaining unit as long as:

- no other facility is within one mile,
- there are 15 or more employees in the requested unit at the location, and
- there is at least one supervisor at the facility.

All other factors described above would be discarded. The Gould Board would only allow multi-facility units where there are "extraordinary circumstances." These circumstances are not defined by the proposal, except that it provides an example of 10 percent or more of the employees transferring temporarily among the facilities in a year. Further, the rule does not apply to ocean-going vessels, utilities or construction industries.

Union-Friendly Rule The new rule would only apply if it is invoked by the union. If a union seeks to organize multiple facilities, the employer is precluded from using the rule to limit the organizing to a single facility. Similarly, the rule could not be invoked in an attempt to decertify the union at a single facility where the employees are represented in a multifacility bargaining unit even if there is strong employee support at the facility for getting rid of the union.

No Administrative Burden Under Current Rules Sometimes, federal agencies attempt to substitute mechanical rules for discretion in an attempt to better manage their workload. Yet, the Board admits that its actions are not spurred by an unmanageable caseload of single-facility cases. Indeed, a National Council of Chain Restaurants study has shown that, during the past 15 years, the Board has averaged only four cases per year involving this issue, with only two cases per year in the past four years. In the preamble to the regulations, the Gould Board candidly acknowledges that, in some cases, "the enhanced individual justice of adjudication" will be sacrificed in the interests of "the clarity and predictability of a rule." Thus, the Board as much as admits that some cases will be decided incorrectly in the interests of what former NLRB Chairman James Stephens calls "marginal economies of process."

Who Benefits? In view of the scarcity of single-facility cases, one must question who the Board thinks would benefit from a remodelling of the law in a way that critical issues, such as who has to share a union with whom, would be resolved, in the words of NLRB Chairman Gould himself, with "a calculator and an odometer."

NACDS

National Association of Chain Drug Stores

David L. Maher
Chairman of the Board

Ronald L. Ziegler
President & CEO

Comments Submitted by

The National Association of Chain Drug Stores

**National Labor Relations Board's (NLRB)
Proposed Rule on Single Location Bargaining Units**

**Committee on Small Business
Subcommittee on Regulation and Paperwork
U.S. House of Representatives**

March 7, 1996

**Statement of the
National Association of Chain Drug Stores
to the Subcommittee on Regulation and Paperwork
U.S. House of Representatives**

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This statement is filed for the hearing record on behalf of the National Association of Chain Drug Stores (NACDS). It conveys the NACDS' concerns related to the National Labor Relations Board's (NLRB) proposed rule on single location bargaining units. A copy of NACDS' formal comments to the NLRB is attached for the hearing record.

Founded in 1933, NACDS includes more than 135 chain companies in an industry that operates over 30,000 retail community pharmacies. Providing practice settings for over 66,000 pharmacists, chain pharmacies comprise the largest component of pharmacy practice. Chain drug stores employ over 600,000 workers nationwide. Forty-six of the nation's largest drug store chains are members, and over two-thirds of NACDS membership consists of chains with fewer than 50 stores.

The proposed rule would require, except in "extraordinary circumstances" that workers at a single location unit would be eligible to engage in collective bargaining if certain factors are met: (1) the unit has 15 or more employees; (2) no other unit of the employer is located within one mile; and (3) a supervisor is present on a regular and substantial basis.

The Board maintains the rule is necessary to set forth "decisive factors" and to avoid confusion "inherent" in case-by-case adjudication. The Board further contends that the rule is necessary to reduce litigation costs and to ensure management and employees better understand the law to improve negotiations.

NACDS believes the proposed rule is neither necessary nor appropriate and, in fact, may lead to more litigation if its misguided provisions become final.

The NLRB justifies its proposed rule by maintaining it will reduce litigation; preserve NLRB's resources; and clarify public confusion related to single unit bargaining units. Yet, in each instance, examination of the evidence fails to demonstrate a need for the rule.

The NLRB's own record disputes its arguments related to caseload and dwindling resources. In 1981, the number of Regional Director decisions was 1837. By 1994, that number had declined by 41 percent to 758. In 1994, the Board issued 45 decisions related to representation, down from 70 cases in 1991. Thus, the NLRB clearly is not overwhelmed with cases demanding attention or resources.

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The Board maintains that the new rule will establish "decisive factors" that will reduce the time and cost of litigation to decide specific cases. Yet, standardization and efficiency should not become the Board's goal at the expense of fairness.

We believe that representation decisions should be based on the facts unique to the case and not be produced on an assembly line. There is no need for the creation of a rigid formula for resolving these issues, especially since the proposed methods have little demonstrated grounding in case law. We believe that good public policy should be based upon evolving precedents that recognize that businesses operate in a dynamic -- not static -- environment.

We believe that the Board should continue to recognize the importance of "community of interest" factors which would be ignored under the proposed rule. By eliminating functional integration, centralized control over operations, permanent transfers, and bargaining history from consideration, the Board rejects elements that could be vital to sound decisions.

The Board ignores advances in communications and technology that make it possible for company headquarters to assert clear and decisive control over even the most remote single unit. As we stated in our comments to the NLRB, its indifference to these advances

"... as a material way in which employees interact with supervision and with each other over time and distance threatens to make the PR (proposed rule) a quaint oddity rather than a relevant tool in labor-management relations".

We also contend that the arbitrary establishment of the "one mile" rule of separation of units cannot be supported. It disregards the Board's own precedents in which geographic separation has been of little significance.

In our formal comments to the NLRB, we raised several other issues that contribute to our opposition to the rule. These points reflect inconsistencies in the NLRB's position and its abandonment of long-standing precedents and traditional findings.

The rule is unwise and unnecessary. The rationale offered in its support cannot withstand close examination. And its bias in favor of union organization is obvious.

In conclusion, NACDS, representing the major portion of the Nation's chain drug store industry and a significant component of its retail businesses, believes current law provides a satisfactory framework for single unit determinations. We oppose the NLRB's proposed rule and urge the Board to withdraw it.

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February 6, 1996

VIA FEDERAL EXPRESS

National Labor Relations Board
 Office of the Executive Secretary
 1099 14th Street, Room 11600
 Washington, D.C. 20570

Re: Response of the National Association of Chain Drug Stores
 ("NACDS") to Notice of Proposed Rulemaking --
 Appropriateness of Requested Single Location Bargaining Units
 In Representation Cases (29 CFR Part 103)

Dear Sirs:

This statement is submitted on behalf of the National Association of Chain Drug Stores ("NACDS") in response to the National Labor Relations Board's Notice of Proposed Rulemaking ("NPR"), dated September 22, 1995, entitled, "Appropriateness of requested single location bargaining units in representation cases." For the reasons discussed below, NACDS believes the proposal is ill-considered. The present law, generally based on a presumption of single-location appropriateness, but allowing multi-location units upon a proper showing in a particular case, long has provided a satisfactory framework for the Board in which to make unit determinations in representation cases. The proposed rule would substitute a rigid formula (despite an appearance of flexibility) for individualized determinations, using a number of criteria which appear to have no real support in Board caselaw. The Board, moreover, has not demonstrated any compelling need to engage in this regulatory adventure.

The NLRB should withdraw the proposed rule as improvidently issued.

I.

The Nature of NACDS and its Interest in the Proposed Rule

NACDS is a not-for-profit international organization, headquartered in Alexandria, Virginia, engaged in promoting and preserving the general welfare of chain drug stores, their employees and their consumers. In furtherance of this mission, NACDS monitors the legislative and regulatory activities on the federal and state levels affecting its constituents, provides information and comment on such matters, and initiates action which, in its view, best serves the general welfare of chain drug stores and their employees.

NACDS currently represents 160 national and international chain drug corporation members, including 135 in the United States operating nearly 30,000 community pharmacies. Forty-six of the largest drug store chains in this country are members, including all the chains with over 250 stores. Members include supermarket and general merchandise retail chains which have pharmacies in their stores, as well as conventional drug store chains. Over two-thirds of NACDS's membership consists of chains with fewer than 50 stores.

Chain drug stores including NACDS members, employ over 600,000 people nation-wide. They also employ approximately 65,000 pharmacists, or about 58% of the

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113,000 that practice in retail pharmacy settings. Employees of some members are represented by unions, while employees of others are unrepresented. In some instances, chains are completely or largely organized; in others, only a few locations have collective bargaining representatives. Chain drug stores have frequently been parties to NLRB representation cases. Since the proposed rule could seriously affect the labor and employment relations of many NACDS members (including companies only some of whose stores are unionized) by disrupting their multi-location administration of employment policies and practices, NACDS has availed itself of this opportunity to respond to the NPR.

II.

The Proposed Rule

The proposed rule applies to all employers over which the NLRB asserts jurisdiction, except public utilities, employers engaged primarily in the construction industry, and employers in the maritime industry in regard to their ocean-going vessels. Proposed Rule ["PR"], 29 CFR § 103.40 (subd. (a)). It would require, except in "extraordinary circumstances" (not defined, although one example, discussed below, is provided in the PR), that an unrepresented single location unit be found appropriate for collective bargaining, provided: (1) that 15 or more employees in the requested unit are employed at that location; (2) that no other location of the employer is located within one mile of the requested location; and, (3) that a supervisor within the meaning of Section 2(11) of the National Labor

Relations Act ("NLRA") is present at the requested location for a regular and substantial period. Id., at subd. (b)(1)-(3). Whenever a party, first through an offer of proof and then by supporting evidence, establishes that an extraordinary circumstance exists or where an employer falls outside the rule in this section, the Board shall determine the matter through adjudication. Id. at subd. (c). Finally, the PR describes only one kind of "extraordinary circumstance": if 10 percent or more of the unit employees have been temporarily transferred to other facilities of the employer for at least 10 percent of their time during the 12 month period preceding the filing of a petition for an election or, where no such petition has been filed, during the 12-month period preceding either the demand for recognition or the time when a bargaining obligation would arise. Id. at subd. (d).

According to the Board majority, the PR is necessary to set forth more clearly the "decisive factors" in most single location cases and to avoid the "confusion and uncertainty inherent in the current approach" of case-by-case adjudication. NPR Supplementary Information Sec. II.C. It would eliminate litigation costs and time currently and unnecessarily expended which, the Board says, is often driven by the parties' attempts to persuade the Board that facts and factors exist in support of a particular result or by the mistaken belief as to which facts or factors are critical for a finding of single unit appropriateness. The Board posits that the PR would also lead to more stipulated election agreements, because parties would better understand this area of the law and be in a better position to negotiate agreements. Id.

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NACDS disagrees that a rule is needed. The Board has not made a clear showing that a departure from its present case-by-case approach to unit determinations is necessary or appropriate, or that the PR would cure the perceived ills of the present approach. Indeed, it is likely to open new vistas of contentiousness and litigation.

III.

The Proposed Rule Is Neither Necessary Nor Appropriate

The Board argues that its proposed rule furthers the Agency's goal of reducing "extensive litigation" with "voluminous transcripts" detailing "a myriad of facts" which consume the Board's "limited and declining resources" in deciding routine single location cases. NPR at Sec. II.A.1. The Board's own statistics, however, suggest that this concern may be overdramatized.

A. Representation Cases Do Not Pose An Undue Burden of NLRB Resources.

The number of representation cases resulting in Regional Director decisions has declined markedly since early in the last decade. In FY1981, 1837 Regional Director decisions were issued in representation and deauthorization cases. 56th Ann. Rep. of the NLRB for FY 1991, at 19 (Chart 13)(1994). By FY 1994, this number had plummeted to 758, or a little more than 41 % of what it had been thirteen years earlier. 59th Ann. Rep. of

the NLRB for FY 1994, at 19 (Chart 13)(1995).

At the Board level, out of a total of 732 decisions in contested cases issued in FY1994, only 45 decisions were issued in representation cases, exclusive of the 161 decisions in objections and challenges cases and 5 decisions in unit clarification cases. 59th Ann. Rep., at 16-17. Only three years before, the Board decided a total of 1066 contested cases of all types, of which 70 were representation case decisions, exclusive of 216 decisions in objections and challenges cases, 6 in unit clarification cases and two in deauthorization cases. 56th Ann. Rep. at 16-17. Therefore, at best, only some of these 45 and 70 representation cases decisions, respectively, might have involved single-location unit issues. (The Board cites no statistics on the number of cases addressing the issue covered by the PR to suggest otherwise. NPR See II.A.3.) Eighty percent of Board elections are held pursuant to stipulation and consent. Id.

It appears, therefore, that single/multiple location unit determinations in representation cases do not represent a major part of the work of the Board or its regional directors. Indeed, representation case filings now constitute only approximately 15% of the Board's intake, compared to approximately 75% of its intake fifty years ago. 59th Ann. Rep. at 21 (Chart 15). Considering that representation case procedures are central to the Act, surely the Board cannot begrudge whatever incremental increase in time and effort "the enhanced individual justice of adjudication" would accord parties in this small and

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diminishing category of cases. See NPR Sec. II.A.1. Adherence to the current method of unit determination would not squander the Board's resources.

B. Representation Case Decisions Are Supposed To Be Individualized Determinations.

NACDS also shares the concerns expressed by other respondents to the Advance Notice of Proposed Rulemaking. See NPR Sec.II.A. It agrees with most respondents that all factors now employed should be retained in the adjudication of cases. The Board complains that these factors are imprecise and vague. NPR at Sec.II.A.2. However, "unit determinations are dependent on slight variations of facts, [so] the Board decides each case on an *ad hoc* basis, and it is not strictly bound by its prior decisions." NLRB v. Carson Cable TV, 795 F.2d 879, 885 (9th Cir. 1986), 123 LRRM 2225, 2229. "Each decision ultimately rests on the particular circumstances of that unique case." Id. "[M]echanistic formulas should be avoided and the facts of every case should be independently scrutinized." Caron International, Inc., 222 NLRB 508, 509 n.9 (1976) (Member Penello). Therefore, unit issues, including the question of how many locations should be included in the unit, are supposed to be decided by "custom-tailored" rather than by "off-the-rack" solutions. The factors to be applied are not imprecise and vague, but responsive to subtleties and shadings of the facts and crafted to better fit the circumstances of the case.

C. The Board's Current Adjudicatory Approach Is Appropriate And Workable.

The Board's reference to *The Developing Labor Law*¹ to show that the single location unit issue "has arisen with some frequency," and therefore should be addressed by a rule, hardly aids in its argument. *Id.* The pages cited demonstrate that the Board has dealt with the single-location unit issue satisfactorily by "embrac[ing] a slowly evolving pattern of presumptions in favor of single-plant units in various industries" which has become a "general policy." *Id.* at 468, 472.² Ultimately, we are left with little more than the Board's desire to engage in rulemaking as justification for this exercise. *Id.*

D. The Board's Response To Charges That Its PR Legislates "Extent of Organization" Unit Determinations Is Weakened By The PR's Lack of Justification.

Naturally, this apparent lack of real need for rulemaking has caused a number of commentators to posit that the proposed rule is simply a means of stimulating union organizing. NPR Sec. II.A.5. The Board seeks to deflect this criticism by stating that a major purpose of the Act is to encourage collective bargaining. *Id.* That may be, but the

¹P. Hardin, *The Developing Labor Law*, 468-72 (3d ed. 1992)

²However, the same source notes that the presumption may be rebutted upon a showing, *inter alia*, of "centralized control" and "centralized management of labor relations." *Id.* at 470 n.118, citing *Charette Drafting Supplies Corp.*, 275 NLRB 1294 (1985), *Ohio Valley Supermarkets*, 269 NLRB 353 (1984), and Schnitzler & Giovanetti, "Retail Stores," in *Appropriate Units for Collective Bargaining*, 120-27 (P. Nash & G. Blake eds. 1979).

Act also makes clear that unit determinations should not be based solely on the extent of organization. Sec. 9(c)(5). Where, as here, the common law approach has worked well over many years, without drawing significant criticism from affected parties, one may indeed question whether the central purpose of these proceedings is not simply to create a rule of substantive law so as to assure in almost every case that an appropriate unit will conform to a union's extent of organization.

Thus, NACDS views many of the criticisms of this proposed rulemaking as valid. As we describe below, moreover, the PR is flawed in its premises and provisions.

IV.

The Board's Rejection of Certain Community of Interest Factors As "Immaterial" In Unit Determinations Is Inconsistent With Its Precedents

The Board seeks to support its PR by eliminating many of its traditional community of interest factors from consideration in determining the appropriateness of a single location unit. These traditional factors were identified in Cornell University, 183 NLRB 329 (1970):

In determining whether a particular group of employees constitutes an appropriate unit for bargaining where an employer operates a number of facilities, the Board considers such factors

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as prior bargaining history, centralization of management particularly in regard to labor relations, extent of employee interchange, degrees of interdependence or autonomy of the plants, differences or similarities in skills and functions of the employees, and geographical location of the facilities in relation to each other.

Id. at 330 (footnote omitted); Queen City Distributing Co., Inc., v/a Sol's, 272 NLRB 621 (1984); see NPR Sec. II.B.1.a., citing I & L Plate, 310 NLRB 429 (1993); see also, Staten Island University Hospital v. NLRB, 24 F.3d 450 (2d Cir. 1994).

The Board's PR, however, would eliminate functional integration, centralized control over the conduct of operations, permanent transfers and bargaining history from any consideration. NPR Sec. III.B.1.b.2.-6. The Board argues that these factors, when considered, are generally supported by other factors that are taken into account by the PR, and therefore, are really inconsequential. Id.

A. The Board Should Give Appropriate Weight To Its So-Called "Non-Material" Factors, Rather Than Discard Them.

There are several problems with the Board's approach. For one, the Board's professed failure to give appropriate weight or independence to these factors in its decisions

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is not the fault of the community of interest rationale. Nor is it a reason for abandoning that rationale now. Rather, if, in fact, the Board has subordinated these factors in the past, the Board should reaffirm them now and accord them greater significance in its decisions.

B. Board Law Has Recognized The Importance of "Non-Material" Factors In Single Location Unit Cases.

Another problem with the NPR is that the Board seems to have minimized the importance it has actually given to these factors in its decisions. In particular, integration of operations and centralized control of day-to-day operations and employee/labor relations has figured prominently in the NLRB's cases rejecting the single-location unit presumption. See, e.g., Gray Drug Stores, 197 NLRB 924, 925 (1972)(centralized control of personnel, labor relations and merchandising, together with the extensive role of the district manager in day-to-day operations of the stores makes single location unit inappropriate); U-Wanna Wash Frocks, Inc., 203 NLRB 174, 175 (1973)(single plant manufacturing unit inappropriate where centralized administration was evident); National Telephone Company, Inc., 215 NLRB 176, 178 (1974)(bargaining unit limited to a single branch inappropriate where wage increase and key personnel decisions are made effectively at the divisional level); Caron International, supra, at 509 (three-plant statewide unit rather than single plant unit appropriate where extensive operation and product integration and centralized control of labor relations are found); Super X Drugs of Illinois, 233 NLRB 1114 (1977)(single location unit inappropriate where district manager or supervisor has final decision-making

authority in disciplinary actions and approval must be received from central management to grant store employees' leaves, vacations, promotions and pay increases); Alma Plastics Company, 265 NLRB 479, 480 (1982)(single plant unit inappropriate in view of centralized personnel administration for two plants and centralized labor relations policy on a day-to-day basis); Nakash, Inc., a Subsidiary of Famous Horse, Inc., d/b/a/ V.I.M. Jeans, 271 NLRB 1408, 1410 (1984) (single retail store unit inappropriate where all metropolitan stores experience a high degree of centralization and the store manager's authority is tightly circumscribed); Sol's, supra, at 621-622 (presumption favoring single-location unit overcome by highly centralized control over the employer's daily operations and labor relations/personnel matters); Eastman Interiors, Inc. d/b/a/ Eastman West, 273 NLRB 610, 612 (1984)(highly interdependent nature of the employer's operational structure compels the conclusion that a separate warehouse unit is inappropriate and that only a wall-to-wall multifacility unit is appropriate); Globe Furniture Rentals, Inc., 298 NLRB 288 (1990)(single location rejected in favor of multi-store unit where employer's operations are highly integrated and administratively centralized); Brattleboro Retreat, 310 NLRB 615, 619 (1993) (presumption of single-unit appropriateness can be overcome by functional integration sufficient to negate the separate identity of the single facility unit; total administrative centralization, including central administration of labor relations policies and programs, present); Neodata Product/Distribution, Inc., 312 NLRB 987, 988-989 (1993)(Regional Director failed to give sufficient consideration to the close functional integration of two plants that effectively operate as a single unit in directing election at single facility). See also

Memorandum to the Board from Member James M. Stephens Regarding Single Facility Presumption -- Proposed Rule, dated August 25, 1995, published in [1995] Daily Labor Report (BNA), No. 198, E-6, E-7--E-8 (October 13, 1995) ("Stephens Memorandum") (chiding the Board for being "somewhat selective" in identifying so-called material factors in Board determinations).

The Board treats dismissively the integration of operations brought about by modern technology. NPR Sec. III.B.1.b.2. Yet, video conferencing, wide-area networks, E-mail, telefaxes, long-distance teleconferencing, modems, same-day and overnight delivery systems, and other similar advances in today's business, often used in combination, increasingly enable employees and managers to communicate as effectively -- some would argue more effectively -- as they would in face-to-face conversation. Television cameras and microphones are now becoming available on personal computers to allow users to transmit voice and visual images. The impact of the Internet and World-Wide Web on commercial activities is still to be fully explored. The Board's unwillingness to consider this accelerating technology as material to the way in which employees interact with supervision and with each other over time and distance threatens to make the PR a quaint oddity rather than a relevant tool in ordering labor-management relations. Cf. Genuine Parts Co. d/b/a Napa Columbus Distribution and Automotive Parts Co., 269 NLRB 1052, 1054 (1984) ("All the local stores are linked by the Computerized Total Automotive Management Systems....")

The Board's haste to write off the significance of permanent transfers also gives us pause. NPR Sec. III.B.1.b.5. A number of its cases have relied on this factor, alone or together with temporary transfers, in refusing petitions for single location units. Also, permanent transfers do not necessarily occur for the convenience of the employee involved, as the Board suggests. See, e.g., Eastman West, supra, at 613 (single-location presumption rebutted by frequent temporary and permanent transfers of sales employees among nine facilities); Globe Furniture Rentals, supra, at 290 (finding that the degree of employer-requested interchange, temporary as well as permanent, among employees at all five facilities supports the employer's position that a single-location unit is inappropriate); Neodata Product/Distribution, Inc., supra, at 988 (that job vacancies were posted at two facilities and employees at both locations could bid on the posted jobs and transfer from one location to another deemed significant in finding multi-location unit appropriate).

Thus, without exhausting all the factors the Board seeks to dispense with, it appears that its classification of certain factors as "non-material" finds at best dubious support in the caselaw. In these circumstances, there is no real justification for the Board's action. As we show below, moreover, the Board's selection of certain criteria as being "material" for assessing the appropriateness of a single location unit is also open to criticism.

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V.

**The "Material Factors" As Described In The Proposed
Rule Are Arbitrary And Inappropriate For Making
Single-Location Unit Determinations**

The PR has selected several criteria for applying the presumption of single unit appropriateness. Two of them are: (1) that no other employer location is located within one mile of the requested location; and (2) that a statutory supervisor is present at the location for a regular and substantial period. PR Sec. 2 (proposed 29 CFR §103.40 (b)(2)-(3)). These proposed criteria are arbitrary;³ As written, they have no support in NLRB precedent. Their application here raises profound questions as to whether the PR reflects "true" representation case law, as claimed by the Board, or even a logical extension of that law. Furthermore, the Board's standard for employee interchange in order to overcome the single location presumption is also artificial, and without support in the law.

A. Geographical Separation

Geographical separation of facilities also has been cited as a factor in determining the appropriateness of a single-location unit. The Board recommends that a one-mile radius be placed on the separation of facilities for purposes of the PR. See NPR

³The PR also provides that the rule will apply only when there are 15 or more employees. Id., §103.40(b)(1). This aspect of the rule is also arbitrary, as the Board as much as concedes by hinting at the possibility of reducing the threshold number.

Sec. III.B.1.c.3.

Here, too, the Board concedes it is drawing a line for the sake of having a rule. It makes no claim to distilling some historically objective standard from its experience in representation cases or to applying its "expertise" to divine a proper geographical criterion. In truth, the PR has no experiential or logical basis. "The line must be drawn somewhere," the NLRB explains, adding, "There is no logically compelling ascertainable optimum distance for a rule since single-location decisions do not precisely correlate with mileage." *Id.* While the Board goes on to state that even establishments less than one mile from each other may constitute appropriate units, it ignores completely the fact that it has frequently found single location units inappropriate where the separation of facilities is far greater than one mile. See, e.g., Barber-Colman Co., 130 NLRB 478, 479 (1961)(single plant unit inappropriate despite 43-mile separation of one plant from other locations); ITT Continental Baking Co., Inc., 231 NLRB 326, 328 (1977)(single-store unit inappropriate where five other locations were located within three, six, eight, twelve and fifteen miles); Cornell University, supra, at 336 (ILR School extension office in New York City inappropriate single location unit although located 280 miles from Ithaca campus where School was located; statewide unit of nonprofessional personnel found only unit appropriate); Orkin Exterminating Co., Inc., 258 NLRB 771, 774 (1981)(single location unit rejected, despite fact that petitioned for branch was between 55 and 190 miles from other branches, and distance from district office to branches ranged from approximately 50 to 230 miles);

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Columbia University, 222 NLRB 309, 310 (1976)(treasurer's office located 10 miles away in same city as university included in multi-location unit with university clerical employees); Caron International, supra (three plants located within a 25-mile radius included in an appropriate multi-location unit); Sol's, supra, at 621 (single location unit inappropriate although stores were as far as 29 miles from each other); Globe Furniture Rentals, supra, at 288 (single location unit inappropriate although employer's stores were from five to 25 miles apart); Eastman West, supra, at 610 (single location unit rejected where all but one retail outlets were within a radius of 20 miles.) See Stephens Memorandum, supra at E-8, E-9.

In fact, geographical separation has had little independent significance in Board decisions. As stated in National Telephone Company, Inc., 215 NLRB 176 (1974), where the Board rejected a bargaining unit limited to a single branch of an interconnect company in favor of a divisional multi-location, multi-state unit, spanning distances of up to almost 400 miles:

This Board . . . has not held that geography should or can be the controlling factor in making unit determinations. And when, as here, all the other factors which we customarily consider militate against a single branch unit, we do not deem it proper to give geography controlling significance.

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Id. at 178 (footnote omitted).⁴ In essence, "[r]elative distance can only be a secondary indication with respect to separate community of interest, and has no significance unless it reflects the primary factors, such as degree of autonomy possessed by the plant manager." Alma Plastics Company, supra, at 481 (Member Jenkins, dissenting from the majority's rejection of a single-facility unit, where a second facility was only 800 feet away). See Caron International, supra, at 508 ("... the 25-mile radius does not interfere with this [functional] integration [of plant operations.]"); Courier Dispatch Group, Inc., 311 NLRB 728, 732 (1993)(affirming a regional director's decision holding that "While geographic proximity is not the controlling factor especially in view of the nature of the employer's operation, . . . it gains significance when other factors also suggest the appropriateness of a single location unit. . . .").

In the absence of any jurisprudential basis for presuming that unless two facilities are separated by a distance of one mile or less they must be presumed to be individually appropriate units, and since the Board has affirmatively recognized that distance alone cannot be a determinant of single-location unit appropriateness, there is no support for

⁴Although the PR expressly exempts public utilities from the application of the single-location unit presumption, the Board in National Telephone made clear that it was not treating the interconnect industry as directly parallel to the utility industry and governed by all precedents developed in that industry to reach this conclusion. Rather, its conclusion was based on the application of traditional community-of-interest considerations. Id. and n.4.

this standard in the PR.⁵ Indeed, NACDS questions how the Board could have concluded even under its own analytical framework that distance between locations was a "material factor." Like the factors it dubs "non-material," geographical separation has "not been determinative in deciding single location cases, but, at best, [has] been used as secondary, bolstering rationale." NPR Sec. III.B.1.b.7. The inclusion of this factor in the PR only demonstrates the inconsistency of the Board's position.

B. Local Autonomy

"Local autonomy" is a second "material" factor discussed by the Board in support of the PR. NPR Sec. III.B.1.c.4. NACDS agrees that this factor has been relevant in NLRB decisions. Unfortunately, local autonomy is not the criterion employed in the PR. There, the standard used is that a supervisor within the meaning of Section 2(11) of the Act is present at the requested location for a regular and substantial period of time. PR Sec. 2 (29 U.S.C. §103.40 (b)(3)).

There is a world of difference between "local autonomy" and the mere presence of a statutory supervisor. Under section 2(11), if an individual has the authority, in

⁵We note, as well, that the significance, if any, of geographical separation upon community of interest can depend as much upon the environment of the facility as mere distance. Facilities in rural, sparsely populated areas that are ten miles apart may be as accessible to each other as those in densely inhabited urban areas which are a mile apart.

the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, and that action requires the use of independent judgment, and is not merely routine, the person is a supervisor. In fact, possession of any one of these powers establishes supervisory status, since the section is to be read in the disjunctive. Flexi-Van Corp., 228 NLRB 956, 960 (1977); Ohio Power Co. v. NLRB, 176 F.2d 385 (6th Cir.), cert. denied, 338 U.S. 899 (1949). Thus, an individual having the authority only to effectively recommend one of these personnel actions (for example, to effectively recommend assignments) may be a supervisor. This authority, no matter how frequently exercised, however, will not invest its holder or the location from which s/he operates with functional local autonomy of any substance.

Board decisions rejecting the single-location presumption have recognized that the presence of a person with supervisory status is not the touchstone of local autonomy. See, e.g., Globe Furniture Rentals, supra, at 289-290 ("... local store managers possess authority over routine day-to-day operations of the facilities they manage, but they lack substantial autonomy regarding labor relations and personnel policies and procedures. . . . Indeed, at best, the facts demonstrate that the store managers are statutory supervisors under Section 2(11) of the Act."); Caron International, supra, at 599 ("Although the line managers at the various plants administer day-to-day problems, the personnel department ... closely reviews all these decisions and establishes and administers any change in personnel policy or

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procedure at the three plants."); Eastman West, supra, at 612 (although store managers could determine schedules of sales employees and grant them time off, and despite the fact that they apparently participated in hiring decisions, the Board found that control over personnel matters was highly centralized); Neodata Product/Distribution, supra, at 989 ("While plant managers at each facility retain some degree of autonomy, they are also constrained in a number of significant respects by the controls imposed by headquarters."). See Stephens Memorandum, supra at E-7, E-8.

The PR, then, does not reflect the appropriate inquiry which the Board is obliged to make with respect to the autonomy of individual locations. The PR would mandate a standard which would not reflect local autonomy at all, but would merely make the supervisory status of one employee tantamount to functional autonomy of the establishment. This is a false equivalent. The detailed factual inquiry necessary for this kind of decision-making cannot be jettisoned in a quest for simplicity.

C. Temporary Interchange of Employees

The temporary interchange of employees as a factor in overcoming the presumption of a single-location unit is hardly remarkable.⁶ However, there is no precedent

⁶But see V.I. M. Jeans, supra, at 1409, where a city-wide unit of retail stores was found appropriate despite the lack of evidence of substantial employee interchange, although some transfers occurred.

for requiring a level of interchange measured by a fixed percentage of the number of employees working at the location and a fixed percentage of their hours spent in other locations over the period of a year. Indeed, the Board notes that although the International Brotherhood of Teamsters proposed increasing the threshold from 10 percent to 25 percent, allegedly to be "more consistent with Board precedent," the Union had "cited no cases for this assertion." NPR Sec. III.B.c.2. The Board states, however, that if there is to be a rule, there must be a standard against which the amount of interchange must be judged. *Id.*

Creating a standard in order to justify the promulgation of a rule seems a peculiar way of advancing the state of the law. In any event, NACDS opposes any such rigid, arbitrary criterion. What is significant employee interchange to one enterprise may be trifling to another. An employer that has relatively low rates of employee interchange may have other characteristics, such as lack of real autonomy in personnel matters on the store level, which nevertheless demonstrate that a single location would be inappropriate for bargaining. Board cases have wisely avoided any mechanical formula for evaluating interchange in assessing single- and multi-location issues.

The PR's mathematical formula has an inherent adverse impact on smaller facilities and those with fewer part-time employees. Locations employing large numbers of part-time personnel on several shifts will tend to meet the threshold with greater frequency than will small establishments employing, for example, fifteen employees (the minimum

number proposed for invoking the rule) on a single shift. A retail store employing 150 employees, most of whom work only 20 hours per week, may readily transfer 15 employees on average for two or three hours each in its normal operation. Yet, under the PR, the transfer of even one employee from the small location for all or most of that person's shift will not suffice, even though, by any common-sensical measure, it would constitute substantial interchange in the circumstances.

The interchange requirement also appears to favor established facilities over those recently opened in rebutting the presumption. This results from the PR's use of a one-year period from the filing of a petition in which to measure interchange. A store which has been in business for at least a year has had an opportunity to establish a track record. A newly opened facility will have had little or no temporary interchange. In a case-by-case adjudicatory approach to unit determinations, the issue of interchange could simply be discounted, projections could be made from partial data after several months, or perhaps, the experience of other facilities of the employer could be used to predict what was likely to happen at the new location. Under the PR, however, there is no apparent flexibility. There would be little chance for the employer at a new location to overcome the presumption. To allow determinations of unit appropriateness to turn on such fortuitous circumstances is hardly compatible with the reasoned administration of the Act.

Thus, the PR as it affects employee interchange suffers from defects which

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also plague other provisions. It is arbitrary and unfair. Furthermore, the Board should not seek to change the law under the guise of simplifying it.

VI.

Conclusion

The PR is unwise and unnecessary. The Board's resources are not taxed by representation cases, which now account for a minority of the agency's business. It can well manage the contested representation cases which come before it. Furthermore, there is nothing demonstrably bad about the Board's current analysis in single-location bargaining unit cases. Applying traditional community of interest factors to a presumption of single-location appropriateness, the Board has developed a body of caselaw which more than adequately informs parties of the guidelines to be used and their application by the Board, while giving the NLRB the necessary flexibility to fashion a result suitable for the particular case.

While there is little cause for complaint with the status quo, there is a great deal to object to in the PR. On the one hand, the Board seeks to dispense with traditional community of interest factors it contends are "not material," but which its cases say otherwise. On the other, it seeks to limit its inquiry to a few so-called "material" factors, at least one of which (geographical separation) appears to be of no unique importance, while the

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others have been recast as rigid rules, without support in law and logic.

We note, as well, that the PR is likely to spawn as much litigation as the Board represents it will avoid. The 10 percent calculation for temporary employee interchange, the calculation of distances between facilities, and that hardy perennial, supervisory status (an issue which will be even more hotly contested if a finding of local autonomy hinges on the outcome), are all fertile topics for litigation -- unless, of course, the Board pretermits such proceedings by rejecting offers of proof and supporting tenders of evidence. But this will only increase the number of cases that wind up in the courts of appeals. Although the courts generally have been deferential to the Board in representation questions, they may be less willing where the Board substitutes rigid, non-empirically based standards for a careful analysis of the facts under tested guidelines. NACDS believes the Board's outlook on litigation avoidance is unrealistically rosy.

With no good reason for imposing a rule, the Agency's motives will be questioned. To many, it will appear that the PR is a transparent effort to tailor bargaining units to the extent of union organization, which, of course, is prohibited. The PR will make it much more difficult for employers to overcome the presumptive appropriateness of a single location unit; the exceptional circumstances provision will be of little or no avail. Furthermore, the Board will be open to charges that it has contrived to make its "reinvention" of the law more difficult for its successors to correct by employing rulemaking

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National Labor Relations Board

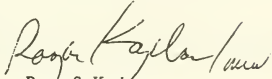
February 6, 1996
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rather than the adjudicatory process. The integrity of the Board requires that its members take care to avoid such allegations.

NACDS urges the Board to withdraw the NPR.

Respectfully submitted,

Jackson, Lewis, Schnitzler & Krupman

A handwritten signature in dark ink, appearing to read "Roger Kaplan / mw". The signature is fluid and cursive.

Roger S. Kaplan
Mark L. Sussman

RSK/mw

c:\wp51\rsk\lrs\nacdspos.sum

JACKSON, LEWIS, SCHNITZLER & KRUPMAN

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February 21, 1996

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Washington, D.C. 20515

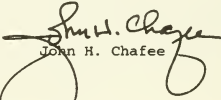
Dear Mr. Talent:

Enclosed please find a letter from my constituent, Mr. William N. Janikies, of Cranston, RI. Mr. Janikies is concerned about the National Labor Relations Board's proposed rule relating to single location bargaining.

I understand that the Paperwork and Regulation Subcommittee of the Small Business Committee will conduct hearings on this matter next month. *If you would like to contact Mr. Janikies, he may be reached at the Jan Companies, 35 Sockanosset Cross Road, P.O. Box 8819, Cranston, RI, 02920; telephone: 401-946-4000.

I hope this information is helpful to you.

Sincerely,


John H. Chafee

JHC:pr

The Jan Companies

35 Sockanosset Cross Road
P.O. Box 8819
Cranston, Rhode Island 02920-0819
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Fax (401) 946-4392



January 4, 1996

Mr. William B. Gould, IV
Office of the Secretary
National Labor Relations Board
1099 14th Street, N.W.
Room 11600
Washington, D.C. 20570

RE: NLRB Proposed Rule, 59 Federal Register 50146 (September 28, 1995)

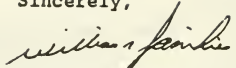
Dear Mr. Gould:

As a Burger King, East Side Mario's and Kenny Rogers Roasters franchisee, I am writing to oppose the National Labor Relations Board's (NLRB) intent to impose a rule on the appropriateness of single location bargaining units. This rule could result in a different union and a separate labor contract at each one of my restaurants if any of my restaurants locations have at least 15 employees, is located more than one mile from any of my other restaurant locations, and if there is one supervisor at the restaurant.

I am concerned that this rule would be divisive for my business undermining the management structure and control I have over all of my restaurants. If you adopt the rule, it will force me to run my restaurants as total separate entities rather than as a collection of businesses. Furthermore, the new rule only permits a hearing under "extraordinary circumstances".

I recommend that a series of hearings be held to permit members of the impacted industries, such as restaurant franchises, to provide input regarding this rule and to outline the reasons why the rule is punitive to business. The rule is egregious and it gives unions an unfair advantage over business. The NLRB should thoroughly examine this proposed rule since it is one of the most drastic changes to federal labor law in the last sixty years. I urge you to proceed cautiously since the employees that the NLRB is supposed to be watching out for may end up being victims instead if the rule is implemented as proposed.

Sincerely,



William N. Janikies
Chief Operating Officer

cc: Rhode Island
Massachusetts
U.S. House of Representatives

Rhode Island
Massachusetts
U.S. Senate

WNJ:at
1971t



Legal Department
(202) 466-1520
FAX (202) 728-1803

March 11, 1996

The Honorable James Talent
Chairman, Subcommittee on Regulation and Paperwork
of the Committee on Small Business
U.S. House of Representatives
B-363 C Rayburn House Office Building
Washington, DC 20515

**RE: Subcommittee's March 7, 1996 Hearing Regarding NLRB's
Proposed Single-Location Bargaining Unit Rule**

Dear Chairman Talent:

At last Thursday's hearing regarding the above-referenced matter, you requested information to support my assertion that the proposed rule would not apply in approximately one third of the cases, because of its requirement that at least 15 employees must be employed at the location where a bargaining unit is requested. Unfortunately, I was unable to provide the information before the hearing abruptly ended at 2:00 p.m.

The information I was referring to is contained in the explanatory materials accompanying the NLRB's proposed rule that was printed in the September 28, 1995 edition of the Federal Register. (60 F.R. 50146, at p. 50156) Those materials contain the following discussion regarding statistics from the NLRB's annual reports:

Those reports contain a table analyzing the size of units in RM and RC representation elections for closed cases in each fiscal year. The statistics are not broken down for single location elections, however. The tables specify the number and relative percentage of all Board elections based on the sizes of the units the eligible employees voted in. The size of the various categories of units begins "Under 10" and increases in increments of 10. The Board does not maintain statistics for any smaller units. For fiscal year 1992, 22.6% of all elections occurred in units of fewer than 10 employees; and 20.8% of elections

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The Honorable James Talent

March 11, 1996

-2-

occurred in units of 10 to 19 employees. Thus, 43.4% of all elections in fiscal year 1992 were in units of 19 or fewer eligible voters. 57 Ann. Rep. Appendices, Table 17 (RC and RM Elections). For 1993, 19.6% of the elections were in units of 10 or fewer eligible voters; 20.5% were in units of 10 to 19 eligible voters. 58 Ann. Rep., Appendices, Table 17. For fiscal year 1994, the Board's preliminary statistics indicate that 19.7% of the elections were in units of 10 or fewer employees, and 19.5% were in units of 10 to 19 employees.

My assertion was based on the above-summarized statistics. I would greatly appreciate your making this letter part of the hearing record.

Once again, on behalf of the AFL-CIO, thank you for the opportunity to testify before the Subcommittee.

Very truly yours,

Peter J. Ford
Assistant General Counsel

cc: Honorable Nydia Velazquez



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